

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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GERALD E. GROFF,)
 Petitioner,)
 v.) No. 22-174
LOUIS DEJOY, POSTMASTER GENERAL,)
 Respondent.)
- - - - -

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) Petitioner,)
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) v.) No. 22-174
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) LOUIS DEJOY, POSTMASTER GENERAL,)
)
) Respondent.)

Washington, D.C.

Tuesday, April 18, 2023

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:08 a.m.

APPEARANCES:

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the Petitioner.

GEN. ELIZABETH B. PRELOGAR, Solicitor General,
Department of Justice, Washington, D.C.; on behalf
of the Respondent.

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1 P R O C E E D I N G S

2 (10:08 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument first this morning in Case 22-174,
5 Groff versus the Postmaster General, Louis
6 DeJoy.

7 Mr. Streett.

8 ORAL ARGUMENT OF AARON STREETT

9 ON BEHALF OF THE PETITIONER

10 MR. STREETT: Mr. Chief Justice, and
11 may it please the Court:

12 Title VII requires religious
13 accommodations absent an undue hardship on the
14 conduct of the employer's business. TWA versus
15 Hardison violates the statute's promise that
16 employees should not be forced to choose between
17 their faith and their job. Hardison's
18 de minimis test makes a mockery of the English
19 language, and no party truly defends it today.

20 Fortunately, Hardison's test is dicta
21 as to Title VII, so the Court can and should
22 construe "undue hardship" according to its plain
23 text to mean significant difficulty or expense.

24 But even if Hardison applied
25 Title VII, its de minimis test lacks

1 precedential force because it was barely
2 considered by the Court, and its
3 neutrality-based rationale has been devastated
4 by Abercrombie.

5 The government's new patchwork test is
6 little better than Hardison's. It allows
7 employers to deny accommodations far short of
8 any fair meaning of "undue hardship." The
9 government believes undue hardship arises
10 whenever there is lost efficiency, weekly
11 payment of premium wages, or denial of a
12 coworker's shift preference.

13 Thus, under the government's test, a
14 diabetic employee could receive snack breaks
15 under Title VII -- under the ADA but not prayer
16 breaks under Title VII, for that might cause
17 lost efficiency. An employee could receive
18 weekly leave for pregnancy checkups but not to
19 attend mass, for that might require denying a
20 coworker's shift preference or paying premium
21 wages. There's no reason religious workers
22 should receive lesser protection than those
23 covered by other accommodation statutes.

24 We know a significant-difficulty-or-
25 expense test works because several states,

1 including New York and California, already apply
2 that test for religious accommodations. And
3 federal courts are well acquainted with applying
4 that test under the ADA and other similar
5 statutes.

6 The Court should establish a textual
7 test for undue hardship and reverse the judgment
8 below.

9 I welcome the Court's questions.

10 JUSTICE THOMAS: Just a couple of
11 cleanup questions.

12 What was actually decided was the law
13 being considered in Hardison? Was it the -- the
14 Title VII as amended, or was it a guideline?

15 MR. STREETT: It was the EEOC
16 guideline that implemented the pre-amendment
17 statute.

18 JUSTICE THOMAS: So the law actually
19 was not interpreted in -- in -- in Hardison --

20 MR. STREETT: That's correct --

21 JUSTICE THOMAS: -- this one?

22 MR. STREETT: -- Your Honor, because
23 the events in Hardison arose before the statute
24 was amended, and the Court squarely stated that
25 it was applying the guideline.

1 JUSTICE THOMAS: The other thing is
2 you say that the government is not making the
3 de minimis argument. So what is the daylight
4 between your argument now and the government's
5 argument?

6 MR. STREET: Sure. It is best
7 explained by what the government thinks arises
8 to the level of an undue hardship. They use a
9 variety of different formulations, but when the
10 rubber meets the road, that's where we see the
11 daylight. And we see that the government
12 believes that any loss of efficiency is going to
13 be an undue hardship. Any regular payment of
14 premium wages, for example, paying overtime to
15 one person per week to attract that person to
16 cover a Sabbatarian's shift, the denial of a
17 single coworker's secular preference, according
18 to the government, is an undue hardship.

19 So, when we take all of that together,
20 while the government's test might sound better
21 than Hardison's on its face, it would have the
22 effect of eviscerating certainly any Sabbatarian
23 observance, which was at the very core of what
24 the Court -- what Congress was trying to
25 protect.

1 JUSTICE THOMAS: So the -- one final
2 question. The -- it seems a little odd that
3 under the ADA, we have the same term, "undue
4 hardship," and I know there's a definition of
5 "undue hardship" there, but it seems as though
6 that there would at least be some comparison to
7 the undue hardship -- the treatment of undue
8 hardship under ADA, and there would be some
9 similarity with Title VII. So would you comment
10 on that?

11 MR. STREETT: Yes, Your Honor.
12 There's right now a huge gap between the
13 accommodations allowed under the ADA and the
14 accommodations allowed under Hardison.

15 And to be clear, we'd be making the
16 same argument here if the ADA wasn't out there
17 --

18 JUSTICE THOMAS: Mm-hmm.

19 MR. STREETT: -- because we believe
20 the best plain text meaning of "undue hardship"
21 is significant difficulty or expense. But the
22 fact that the ADA and this other web of
23 accommodation statutes requires employers to
24 accommodate for a variety of reasons and they
25 know how to apply a significant-difficulty-or-

1 expense test bolsters our argument because
2 Congress understood the plain meaning of "undue
3 hardship" to mean significant difficulty or
4 expense, and that's what it wrote into those
5 statutes.

6 CHIEF JUSTICE ROBERTS: It seems to me
7 we might be getting a little ahead of ourselves
8 in talking about the ADA standard or -- or some
9 others. The first question presented just says
10 whether or not the test applied in -- in
11 Hardison is an appropriate test, their
12 interpretation of undue burden. We don't have
13 to address the second issue, do we?

14 MR. STREETT: Your Honor, certainly,
15 addressing Question Presented 1 will solve 90
16 percent of the problems. We do think the Court
17 should answer Question Presented 2 because that
18 establishes the yardstick against which the
19 quantum in QP 1 is going to be answered.

20 So there are seven or eight circuit
21 courts that have said that an undue hardship on
22 an employee or a coworker is itself an undue
23 hardship on the conduct of the business. But we
24 believe this Court would -- would -- would
25 appropriately advise those lower courts that

1 that's not correct and that the correct metric
2 is the conduct of the business.

3 CHIEF JUSTICE ROBERTS: Well, there
4 might be -- there are differences between ADA
5 cases, USERA cases, Pregnancy Work Act cases.
6 They apply to a fairly discrete category of
7 individuals.

8 Title VII, obviously, has a broader --
9 broader scope, and I'm wondering if that's the
10 sort of issue that we need to address here when
11 it seems to me there's enough on our plate
12 perhaps with respect to the undue burden
13 standard.

14 MR. STREETT: Your Honor, we don't
15 disagree. We would be fine with an opinion that
16 doesn't say anything about the ADA or those
17 other statutes but just interprets the plain
18 text that the Court so clearly eviscerated in
19 Hardison.

20 And we think that, again, the ADA and
21 these other statutes just confirm the plain
22 meaning. While there are certainly differences
23 as to all of the types of accommodations under
24 the different statutes, Congress chose the same
25 basic undue hardship metric for all of them.

1 JUSTICE SOTOMAYOR: Excuse me. You
2 are really asking us to overrule not just the
3 de minimis test but the entire holdings of
4 Hardison. You appear to be saying that the
5 three holdings of Hardison, as I understood them
6 to be, one, that a employ -- it would be an
7 undue hardship if an employer has to breach its
8 collective bargaining agreement. I didn't see
9 you arguing that in your brief, but you've just
10 said it here today in your opening. Am I
11 correct? You want us to overrule that part of
12 Hardison?

13 MR. STREETT: No, Your Honor, because
14 we don't think that is the holding of Hardison.
15 Hardison is limited to seniority systems, and
16 that was based on a carve-out --

17 JUSTICE SOTOMAYOR: That's assuming
18 you're right on that, and that issue wasn't
19 addressed by the Third Circuit, whether to let
20 them all out. Here was that. But are you
21 conceding that it's an undue burden to violate a
22 collective bargaining agreement's seniority
23 system?

24 MR. STREET: Yes, Your Honor. We --

25 JUSTICE SOTOMAYOR: So you're ignoring

1 Hardison's language then that said any other
2 type of agreement would pose -- violation of any
3 kind of agreement would violate -- would be
4 an -- would be a substantial burden?

5 MR. STREETT: While there is some
6 broader language in Hardison, we believe the
7 best reading of that --

8 JUSTICE SOTOMAYOR: So let me go to
9 the second, paying premium wage. You said that
10 even if they had to pay it year-round, that is
11 not an undue burden. That's not what Hardison
12 said. So you want us to overrule that?

13 MR. STREETT: We agree that is
14 inconsistent with the plain meaning of undue
15 hardship. We would not --

16 JUSTICE SOTOMAYOR: And, finally,
17 here's a man who applied for a job where he has
18 to work Saturdays, Sundays, and holidays, and he
19 applies and he says, well, now I'm not working
20 Sunday and I'm not working religious holidays
21 because that's consistent with me, with my --
22 with my religion, and it's not an undue burden
23 to force the employer to have to give other
24 employees greater work or to -- or to have to
25 cover more days than it would normally have to

1 cover or to force people who also have the same
2 job title to work every holiday and every
3 Sunday.

4 You're saying that can't be an undue
5 hardship.

6 MR. STREETT: That's not our position
7 because that's not the facts of this case, Your
8 Honor.

9 JUSTICE SOTOMAYOR: Well, he -- he
10 was -- he was an RCA. He was required to work
11 Saturday, Sunday, and holidays. And now he
12 doesn't want to work half the days he was hired
13 to work.

14 MR. STREETT: A few important factual
15 clarifications. First of all, when Mr. Groff
16 was hired, there was no Sunday delivery, but
17 that's a little bit beside the point.

18 The position of an RCA is defined at
19 JA144 in the record as being a noncareer
20 employee who fills in for career employees
21 whenever needed. It's not specific to Sundays
22 and holidays. That's actually a different
23 position within the Postal Service known as
24 ARCs.

25 JUSTICE SOTOMAYOR: That was Sunday

1 and holidays.

2 MR. STREETT: That was Sunday and
3 holidays. Mr. Groff's position is filling in
4 throughout the week when -- when another career
5 employee is absent. So he did not sign up for a
6 job specific to Sundays and holidays, and we
7 concede that would be a very different case.

8 With respect to the -- the factual
9 question of whether other employees were
10 required to -- to work more or work overtime,
11 there's no evidence in the record of that. The
12 evidence in the record is that individuals had
13 to work on Sundays when they would prefer not to
14 work. But that's just the nature of --

15 JUSTICE SOTOMAYOR: All right.

16 MR. STREETT: -- an accommodation.

17 JUSTICE SOTOMAYOR: So you want us to
18 overrule at least two of the three holdings of
19 Hardison.

20 MR. STREETT: Yes. We don't --

21 JUSTICE SOTOMAYOR: All right. Now --

22 MR. STREETT: -- think those two
23 holdings are consistent.

24 JUSTICE SOTOMAYOR: -- how do we
25 import the language of the other statutes in

1 defining "undue hardship" now when Congress, for
2 at least between 1994 and 2013, declined to
3 replace Hardison with significant difficulty or
4 expense?

5 So now we're going to take language
6 from another statute that -- that Congress has
7 decided itself not to adopt and to import it
8 into the plain definition of undue hardship.

9 MR. STREETT: Again, Your Honor, we're
10 not seeking to import that language. We'd be
11 making the exact same argument if those statutes
12 didn't exist.

13 But, on your question about
14 congressional acquiescence or -- or trying to
15 divine what Congress was up to there, there are
16 none of the strong indicia of congressional
17 acquiescence that this Court has looked to in
18 other stare decisis cases.

19 Congress did not amend the definition
20 of religion. Congress did not overhaul
21 Title VII while leaving Hardison intact.

22 JUSTICE SOTOMAYOR: Wait a minute.
23 But it has overhauled -- at least twice
24 overruled decisions of ours it didn't like. It
25 did it in Patterson, and it did it in Ledbetter.

1 So it has not been silent when it hasn't liked a
2 definition that we've given something --

3 MR. STREETT: In that --

4 JUSTICE SOTOMAYOR: -- in the Civil
5 Rights Act. Many other acts it remains silent,
6 but not on this one.

7 MR. STREETT: In Alexander versus
8 Sandoval, this Court described what happened to
9 Title VII as not being an overhaul of the
10 statute but only amendments as to selected
11 provisions from which there could not be any
12 inferences drawn.

13 JUSTICE SOTOMAYOR: Well, this is
14 different.

15 JUSTICE KAGAN: Mr. Streett, we
16 don't --

17 JUSTICE SOTOMAYOR: Go ahead.

18 JUSTICE KAGAN: We don't really need
19 evidence of congressional acquiescence, do we?
20 I mean, this is a statutory decisis -- statutory
21 stare decisis case, and we've said over and over
22 that when there's a statute involved rather than
23 the Constitution, stare decisis is at its peak.
24 And this has been -- you know, for decades, this
25 has been the rule. Congress has had that

1 opportunity to change it. Congress has not done
2 so.

3 You can count on, like, a finger how
4 many times we have overruled a statutory ruling
5 in that context.

6 MR. STREETT: Two points on that, Your
7 Honor. First, the starting point should be
8 Footnote 1 in Patterson versus McLean, where the
9 Court says, in a stare decisis case, mere
10 congressional inaction is not sufficient for
11 this Court to abide by an erroneous
12 interpretation. And that's when the Court looks
13 to other indicia of congressional acquiescence.

14 JUSTICE KAGAN: That's a different
15 stare decisis rule than any I've ever heard. I
16 thought that our statutory decisis rule went
17 like this: It doesn't really matter whether the
18 thing is wrong. I mean, stare decisis only has
19 a role to play when the ruling is wrong. If the
20 ruling were right, we wouldn't need statute --
21 we wouldn't need stare decisis.

22 Stare decisis has a role to play even
23 when -- I mean only when a ruling is erroneous,
24 and still we say Congress has had a chance to,
25 the ball was in Congress's court, Congress has

1 not done it for reasons of predictability, for
2 reliability, for reliance, for reasons of the
3 credibility of the judicial system. We maintain
4 what we said about what statutes mean.

5 MR. STREETT: Even for statutory
6 stare decisis, this Court looks at the
7 enumerated factors, and this is the exceptional
8 case where every factor weighs in favor of
9 overruling, not just the exceptionally poor
10 quality of the reasoning in Hardison, not just
11 the congressional acquiescence, which I won't
12 hammer on any further, but the fact that the
13 government's not even defending either the test
14 and it's certainly not defending the rationale
15 of Hardison, which was all about treating
16 religious practices on a neutral level with
17 secular preferences.

18 JUSTICE KAGAN: Well, the SG can say
19 or not what she's defending and what she's not.
20 As I read the SG, she's saying that three words
21 do not represent the core of Hardison's
22 reasoning or the core of Hardison's holding but
23 that she is standing full square behind what she
24 understands to be Hardison's actual reasoning
25 and holding with respect to the facts there.

1 But putting that aside, because I'm
2 sure she will tell us about that, what -- what
3 factors are -- you -- you know, if the reasoning
4 is wrong, that's just another way of saying that
5 the decision is wrong. That doesn't count when
6 you're standing up there and saying that we
7 should overrule a 40-year-old statutory
8 precedent.

9 MR. STREETT: Happy to talk about the
10 factors, Your Honor.

11 First of all, whether or not the
12 government defends the test when it stands up
13 here today, it is not defending the rationale.
14 And a key factor this Court has looked at,
15 including in *Kimble versus Marvel*, is whether
16 the rationale has been eroded by later decisions
17 of this Court.

18 There is absolutely no good answer for
19 why *Abercrombie* has not devastated the
20 neutrality rationale.

21 JUSTICE KAGAN: *Abercrombie* just said
22 that Title VII insisted and required some kinds
23 of accommodations. And there's nothing in
24 *Hardison* that is inconsistent with that ruling.
25 *Hardison* says sometimes accommodations are

1 required, sometimes they're not.

2 Now you think that they should be
3 required more often. But there's nothing in
4 Abercrombie that's remotely inconsistent with
5 Hardison. They -- Abercrombie says sometimes
6 accommodations are required. So does Hardison.

7 MR. STREETT: I couldn't disagree
8 more, Your Honor. I think, if you read pages 83
9 and 84 in Hardison, the three sentences that
10 follow this Court's enunciation of the
11 de minimis test are all about that Title VII
12 requires neutrality and it's not appropriate to
13 give a preference for religious reasons for not
14 working on the weekend.

15 Abercrombie completely reversed that
16 understanding of Title VII. But even if you're
17 not persuaded by that, Your Honor, certainly,
18 the reliance interests are very weak here.
19 They're even weaker than they were in Janice
20 because employers are always required to update
21 their HR manuals to adjust to this Court's
22 decisions.

23 JUSTICE ALITO: Do you -- Mr. Streett,
24 do you think that a change in this Court's
25 understanding of the meaning of the religion

1 clauses of the First Amendment is a relevant
2 factor in determining whether the statutory
3 interpretation in Hardison should be revisited?

4 It's really hard to understand the
5 decision in Hardison except as an exercise in
6 constitutional avoidance. Although the Court
7 didn't mention that concept in its opinion, that
8 was very prominent in the briefs and in the oral
9 arguments in Hardison.

10 And a way to understand the adoption
11 of the de minimis test was the view that the
12 Establishment Clause, as interpreted in Lemon,
13 which talked about anything that advances
14 religion, would be violated by any departure
15 from strict neutrality between employees who
16 wanted a secular exemption and those who wanted
17 a religious exemption.

18 But Abercrombie and some of our later
19 cases do make it clear that that is an incorrect
20 interpretation of the Establishment Clause.

21 So even though constitutional
22 avoidance is not mentioned there, do you think
23 that is a relevant factor?

24 MR. STREETT: Yes, it's important for
25 two reasons. First, the reason Your Honor

1 mentioned, which we completely agree with, which
2 is that there have been further erosions of the
3 doctrinal underpinnings that seem to motivate
4 Hardison.

5 But, second, and going back to the
6 idea of what was Congress thinking here, if
7 we're going to go down the path of trying to
8 guess what Congress was thinking, it may very
9 well have been that Congress felt hamstrung by
10 this Court's Establishment Clause jurisprudence
11 and didn't feel that it could adopt a heightened
12 standard for undue hardship. In fact, there
13 were witnesses in both of the hearings that
14 spoke about that very question.

15 JUSTICE KAGAN: Can I say --

16 JUSTICE KAVANAUGH: Can I ask you --

17 JUSTICE KAGAN: -- I think that that's
18 a -- I'm sorry.

19 JUSTICE KAVANAUGH: Go ahead.

20 JUSTICE KAGAN: No, please.

21 JUSTICE KAVANAUGH: No.

22 (Laughter.)

23 JUSTICE KAVANAUGH: You go first.

24 JUSTICE KAGAN: I mean, I think --

25 CHIEF JUSTICE ROBERTS: Justice Kagan.

1 Seniority.

2 JUSTICE KAGAN: -- I think that that's
3 an unusual theory. It's good that Justice
4 Kavanaugh interrupted me because I would have
5 used a different word than "unusual."

6 (Laughter.)

7 JUSTICE KAGAN: I mean, you know,
8 we're -- now we're guessing as to what the Court
9 may have thought in Hardison, which it never
10 said in Hardison, or what Congress might have
11 thought, even though it never said it? You
12 know, that maybe everybody was motivated by an
13 erroneous view of the Constitution, even though
14 that erroneous view of the Constitution, you
15 know, doesn't appear in any part of Hardison and
16 doesn't appear in anything that we can point to
17 in the Congressional Record? And that's why
18 we're going to overrule a statutory precedent?
19 Because it might be, using our sort of fortune
20 teller apparatus, that, you know -- or our, you
21 know, soothsayer apparatus, that that might have
22 been what was in people's minds?

23 MR. STREETT: Your Honor, we are not
24 the ones here asking for this Court to guess
25 about what Congress is doing. It's our position

1 that Congress -- congressional silence or
2 inaction does not get you off the starting
3 blocks. There has to be some affirmative
4 evidence of congressional acquiescence.

5 My point is just, if the Court's going
6 to go down that road and guess at what was going
7 on, that's as -- that is at least as plausible
8 an explanation as that Congress agreed with this
9 Court's in Hard -- decision in Hardison.

10 Congress -- there's no house of
11 Congress taking a vote approving of the -- the
12 ruling in Hardison or, you know --

13 JUSTICE KAVANAUGH: Can I --

14 MR. STREETT: -- refusing to
15 disapprove of it.

16 JUSTICE KAVANAUGH: Can I just ask
17 about Hardison itself? Because I think Hardison
18 has to be interpreted in light of for --
19 Footnote 14, which talks about not de minimis
20 costs but substantial expenditures or
21 substantial additional costs.

22 And if we assume, as the Solicitor
23 General, I think, seems to say, that we should
24 not use the term "de minimis costs" but we
25 should use what's in Hardison in Footnote 14,

1 "substantial costs," "substantial additional
2 costs," then that standard, substantial costs,
3 substantial additional costs, is perfectly
4 appropriate. Your answer to that?

5 MR. STREETT: If you were just to say
6 the word "substantial costs" in a vacuum, that
7 sounds pretty good to me. The problem is when
8 you look at how that was applied in Hardison --

9 JUSTICE KAVANAUGH: Okay. So let --
10 I'm going to interrupt you there, because I
11 think there are two things going on here
12 clearly. The formulation of the words of the
13 test and substantial, significant -- who knows,
14 you know, what those will mean.

15 Where it really matters -- and I think
16 you're pointing this out correctly -- is how do
17 we apply it to a situation where you have to pay
18 new workers, where you have to go short-shifted,
19 where you have to violate a collective
20 bargaining agreement or a memorandum of
21 understanding. And those specifics, I think,
22 are where it -- it cashes out, so to speak. Do
23 you agree with that?

24 MR. STREETT: I do agree with that,
25 Your Honor, and we're not just talking about, of

1 course, opportunities of short-shiftedness or
2 short-handedness or talking about hiring new
3 employees. We're talking about just paying
4 premium wages to get existing employees to
5 voluntarily work --

6 JUSTICE KAVANAUGH: Well --

7 MR. STREETT: -- or just scheduling.

8 JUSTICE KAVANAUGH: -- in this case
9 you're talking about?

10 MR. STREETT: Well, in this case and
11 in general. The government's position and the
12 -- the holding of Hardison has to do with paying
13 voluntary premium wages to attract somebody to
14 work with that.

15 JUSTICE KAVANAUGH: Well, right. In
16 this case, just to talk about that for a minute,
17 do you agree that the Post Office was violating
18 the MOU?

19 MR. STREETT: No, we don't, Your
20 Honor. And we --

21 JUSTICE KAVANAUGH: And why not?

22 MR. STREETT: -- we explain that in
23 our reply brief. Because the MOU does not spell
24 out an exclusive list of opportunities to avoid
25 Sunday scheduling, and so we think it should be

1 read in conjunction with the Title VII duty to
2 accommodate.

3 JUSTICE KAVANAUGH: If it did violate
4 the MOU, would you lose?

5 MR. STREETT: No, Your Honor, because
6 Congress knows how to carve out provisions to --
7 to declare them not to be an unlawful employment
8 practice. It did that with the seniority
9 systems in Section 703(g) that Hardison talked
10 about. It did not extend that to all collective
11 bargaining provisions.

12 JUSTICE KAVANAUGH: Then what about, I
13 guess in this case, again on the facts here,
14 that you had one employee quit, one employee
15 transfer, and another employee file a grievance
16 as a result of what Mr. Groff was receiving in
17 terms of treatment? How do we think about that?
18 Again, applying whatever it is, substantial
19 costs, how do we think about applying that to
20 that circumstance?

21 MR. STREETT: Sure. So just on the
22 facts of this case, a quick clarification.
23 There was one employee who transferred allegedly
24 because of Mr. Groff. There was no other
25 employee at his post office that transferred

1 because of Mr. Groff. That's a little bit
2 perhaps unclear in the government's brief. But
3 that's at JA64.

4 But all the things Your Honor
5 mentioned would go into the evidentiary mix, and
6 the employer could use all of that evidence to
7 adduce whether, in fact, the employee's
8 operations are being disrupted, whether it's
9 unable to serve its customers, whether its
10 workforce is not producing.

11 JUSTICE KAVANAUGH: Yeah, and I guess
12 what's the answer? That's -- that's the hard
13 thing.

14 MR. STREETT: Sure.

15 JUSTICE KAVANAUGH: That's why I think
16 I'm not -- going to the Chief Justice's maybe
17 first question, when we toss out a standard from
18 this case, substantial costs or -- from Footnote
19 14, the hard thing is going to be how to apply
20 it. And I'm not sure we can give you a full
21 manual of how -- how it's going to play out.

22 MR. STREETT: Sure, Your Honor, but
23 that's the words Congress chose in the statute.
24 Undue hardship is necessarily a flexible and
25 context-specific standard. That's one reason

1 we'd urge the Court to adopt this --

2 JUSTICE KAVANAUGH: So, if we just say
3 substantial costs, read Footnote 14, substantial
4 costs, go forth, courts?

5 MR. STREETT: We think the Court needs
6 to give more guidance than that. That's why we
7 like the significant-difficulty-or-expense test,
8 because you have New York and California and
9 other states already applying that test for
10 religious accommodations. There's case law out
11 there. It's workable. The -- if you read the
12 ADA guidelines and the ADA manual from the EEOC,
13 it's quite helpful in answering the questions
14 that Your Honor posed about the effect of
15 collective bargaining agreements, about the
16 effect of individuals quitting or supposedly
17 being overloaded with work.

18 And, again, those are going to be
19 fact-specific cases. Oftentimes, they're going
20 to go to a jury. But the employee is not always
21 going to lose, and that's where we are right now
22 with Hardison.

23 JUSTICE BARRETT: Why shouldn't these
24 go to a jury? I mean, Judge Hardiman thought
25 they should. I mean, it seems to me the court

1 of appeals didn't reach the MOU issue, and, you
2 know, even if you assume that this is conduct to
3 a business and that, you know, effects on
4 coworkers don't automatically count, it's not --
5 there's not a record here that shows that -- you
6 know, that it wasn't a substantial cost to the
7 business.

8 I just don't understand why we would
9 decide that.

10 MR. STREETT: Two points on that, Your
11 Honor. First of all, of course, we would be
12 happy if this Court states the significant-
13 difficulty-or-expense test and remands for a
14 trial.

15 Second of all, there was substantial
16 evidence in the record here, including the
17 corporate representative's concession at pages
18 266 to 268 in the Joint Appendix, that
19 accommodating Mr. Groff was not causing an undue
20 hardship on the business. And you had the
21 Holtwood postmaster's contemporaneous e-mail at
22 316 to 17 in the record that says accommodating
23 him is not causing an undue hardship; that would
24 only arise if we scheduled him knowing that
25 somebody else wouldn't show up.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 Justice Thomas?

4 Justice Alito?

5 JUSTICE ALITO: Put aside the question
6 of whether it's legitimate to speculate about
7 the reason for the reasoning in Hardison. Do
8 you think that there's anything illegitimate
9 about discounting an argument about
10 congressional acquiescence or congressional
11 inaction when there's good reason to believe
12 that a reasonable member of Congress would think
13 that there would be constitutional problems with
14 adopting the kind of remedial legislation that
15 is posited?

16 MR. STREETT: Yes, I think that would
17 be an appropriate reason to discount an argument
18 based on congressional inaction, particularly
19 when you had witnesses at those hearings warning
20 Congress that to adopt a significant-difficulty-
21 or-expense standard would call into question the
22 constitutionality of Title VII.

23 JUSTICE ALITO: Do you think it's
24 legitimate to lump together a request for
25 accommodation that would contravene seniority

1 rights with a request for accommodation that
2 would have nothing to do with seniority but
3 would arguably violate a collective bargaining
4 agreement or a memorandum of understanding? Are
5 they the same things?

6 MR. STREETT: No, Your Honor, they're
7 not the same things, most particularly because
8 Congress specifically carved out seniority
9 rights from the duty to accommodate. And we're
10 not challenging that holding here. It would be
11 quite concerning to expand that to CBAs because
12 that would allow unions and employers to
13 negotiate away religious accommodation rights
14 that are protected by the statute.

15 JUSTICE ALITO: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice
17 Sotomayor?

18 Justice Kagan?

19 JUSTICE KAGAN: Can I ask you a couple
20 of questions about how you think that your
21 standard plays out? And one is a clarification
22 question.

23 I thought that I understood you to say
24 that if an employer had to pay premium wages in
25 order to find employees who could pick up the

1 slack, so to speak, that that would not rise to
2 the level of significant difficulties, is that
3 correct?

4 MR. STREETT: We do not articulate
5 that as a per se rule, Your Honor. But,
6 certainly, in the mine run of cases which
7 involve blue-collar workers, as our amici point
8 out, we're talking about a hundred, \$200 a week.
9 For a corporation of any significant size,
10 that's not going to be an undue hardship.

11 JUSTICE KAGAN: Okay. And then
12 thinking about this question about burdens on
13 coworkers, I mean, I basically understood you to
14 say that their burdens on coworkers again just
15 did not count as a significant difficulty or
16 expense. So let me just give you a hypo. It's
17 similar to the facts of this case, but we'll
18 just, you know, simplify it a little bit.

19 You know, there's a -- a -- a -- a
20 rural grocery store, let's say, and it has three
21 employees, and it's important to the grocery
22 store that it stay open on Sunday. And one of
23 the employees says, no, I'm a Sabbath observer.
24 But the other two employees are not thrilled
25 about the idea of working on Sunday either. I

1 mean, maybe they want to go to Little League
2 games with their kids or maybe they want to go
3 to church too, but they're not a Sabbath
4 observer and can't ask for this sort of
5 accommodation or maybe anything else.

6 And -- and so it's, you know, may --
7 maybe they quit or, even if they don't quit,
8 they -- their morale is very bad or -- or even
9 if they're just like great people and, you know,
10 they manage to keep a stiff upper lip and smile
11 every day, the employer just thinks, boy, this
12 is just an inequitable situation because all of
13 these people really want to take Sundays off.
14 And it's -- it's true that there's not a
15 religious observance in place, although, as I
16 said, there can be. I mean, some of these other
17 employees might want to go to church on Sunday
18 too.

19 But, like, none of that can count? An
20 employer -- it's a three-person grocery store,
21 none of it can count?

22 MR. STREETT: Our position is not that
23 it should not count. So let me try to lay out
24 some background principles to answer that
25 question.

1 First of all, of course, Title VII
2 only kicks in at 15 employees, so that may or
3 may not ever arise, but --

4 JUSTICE KAGAN: Well, it's just like
5 this little post office. I mean, obviously, the
6 post office has more than 15 employees, but this
7 little post office did not have more than 15
8 employees. This little post office was a rural
9 post office with a few people trying to deliver
10 the mail.

11 MR. STREETT: But, when you look at
12 the broader context, that shows why this case is
13 different, because for 40 -- from your
14 hypothetical, because for 46 out of the 52 weeks
15 of the year, the post offices were combined for
16 purposes of assigning RCAs.

17 There were 40 RCAs available to be
18 assigned to 12 to 15 shifts each Sunday. So
19 accommodating Mr. Groff for 46 out of the 52
20 weeks of the year would only have reduced the
21 number of available assignees from 40 to 39.
22 That's -- that's de minimis.

23 Now you're asking about the six weeks
24 of the year. So it may be quite different for a
25 grocery store year-round having to accommodate

1 in that way. This is for six weeks out of the
2 year. And even then, the local post office was
3 able to borrow RCAs from other local post
4 offices just in the way it did the rest of the
5 year. So that's a very different hypothetical.

6 In your case --

7 JUSTICE KAGAN: So, as -- as I
8 understand what you just said to me, that seems
9 like a very different position from your brief.
10 Your brief seemed to me to be pretty hard-line
11 about you just can't take into account employ --
12 co-employee burdens.

13 Are you backing away from that now?

14 MR. STREETT: Well, we're not backing
15 away because that's never been our position. We
16 said that the effect on coworkers can be
17 relevant evidence of an effect on the conduct of
18 the business.

19 So the employer can come forward with
20 evidence that the morale issues or the quitting
21 of an employee or the overburdened nature of the
22 employees' work can be put forward as evidence,
23 but it must show that there is some disruption
24 to the operation of the business.

25 That's the exact way the ADA applies

1 it, as we point out on pages 43 and 44 of our
2 brief. Beyond that, the employer --

3 JUSTICE KAGAN: I mean, isn't there
4 always going to be disruption to the business,
5 or, you know, I mean, employees conduct the
6 business, so if you're -- if employees are
7 burdened, that affects the business.

8 MR. STREETT: I -- I don't think
9 that's the right way to look at it for -- for
10 this reason, Your Honor.

11 The question is what's our yardstick
12 or what's our metric here. And, yes, as a
13 general rule, something that happens to an
14 employee is going to have some -- some effect at
15 some, you know, minuscule or marginal level
16 possibly or possibly a larger level.

17 But the question is what do we apply
18 the undue hardship standard to, and that has to
19 go to the business as a whole. The Court
20 shouldn't just leap from the fact that there's
21 an undue hardship on a particular employer or
22 employee to the fact that there's an undue
23 hardship on the conduct of the business.

24 JUSTICE KAGAN: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Gorsuch?

2 Justice Kavanaugh?

3 JUSTICE KAVANAUGH: One thing about
4 this case that I think makes it a little more
5 difficult is that there can be religious
6 interests on both sides, and I'll just pick up
7 on Justice Kagan's questions.

8 So you have a group of employees who
9 are all religious, let's say, but the Catholic
10 and the Baptist don't get it -- don't get the
11 Sunday off because they're told you're the wrong
12 religion or you have the wrong religious beliefs
13 versus the person who has the right religious
14 beliefs to get the Sunday off.

15 Does that matter?

16 MR. STREETT: If I'm understanding the
17 hypothetical correctly, you have one employee
18 who has a strong objection to working on Sunday
19 and others who do not, but they --

20 JUSTICE KAVANAUGH: One who has a
21 religious -- say your client, okay, and then you
22 have a Catholic who says, well, I -- I would
23 prefer not to work on Sunday either, but my
24 religion doesn't compel me not to work on
25 Sunday, and a Baptist says the same thing and a

1 Jewish employee says the same thing and -- you
2 know, on Saturday, and -- but that's -- that's
3 not good enough. So your -- your religion's not
4 good enough.

5 So there's religious interests,
6 arguably, in that sense too, and some of the
7 amicus briefs point that out. I just wanted --
8 is that irrelevant? Should we think about that
9 at all?

10 It seems concerning that you're told,
11 in effect, you don't get Sunday off even though
12 you're religious. The other guy next to you
13 gets Sunday off because he's religious, but his
14 religion gives him a little more -- a little
15 more benefit there.

16 MR. STREETT: Certainly, the statute
17 does frame this in terms of the person who asks
18 for the accommodation and believes their
19 religious practice requires them to do
20 something.

21 And I think Congress understood that
22 there is something different in -- in the -- in
23 kind about asking somebody to surrender their
24 conscience or their job than it is about giving
25 up a preference, even if it's a religious

1 preference, but certainly as to secular
2 preferences as well.

3 Now, again, if that's -- if the
4 employees feel that that's unfair and they go to
5 their employer and they complain or they quit,
6 then that's something that the employer could
7 put forward as evidence that could ultimately
8 rise to the level of an undue hardship on the
9 business if they can show concrete evidence on
10 the operations of the business.

11 JUSTICE KAVANAUGH: So, if those
12 employees say this is unfair and morale starts
13 going down, they may complain, someone leaves,
14 that's the kind of thing that you agree can be
15 an effect on the conduct of the business and,
16 therefore, the employer can take that into
17 account at that point?

18 MR. STREETT: It can be evidence of
19 effect on the conduct of the business, but
20 morale or threats to quit or whatever the case
21 may be needs to have a concrete effect on the
22 operations of the business.

23 JUSTICE KAVANAUGH: And I hate to
24 belabor this, but what exactly does that mean?

25 MR. STREETT: So I think it's going to

1 be a context-specific --

2 JUSTICE KAVANAUGH: Okay.

3 MR. STREETT: -- case-by-case --

4 JUSTICE KAVANAUGH: What does that
5 mean?

6 MR. STREETT: -- analysis.

7 JUSTICE KAVANAUGH: What does -- yeah,
8 what does that mean?

9 (Laughter.)

10 MR. STREETT: So I think it means the
11 exact same thing. It means, in the ADA context,
12 we site the guidelines at pages 43 to 44.

13 JUSTICE KAVANAUGH: I mean, anyone
14 running a business in America knows that morale
15 of the employees is critical to the success of
16 the operation.

17 MR. STREETT: Sure. And I think the
18 EEOC has rightly said in the ADA guidelines and
19 the cases interpreting the ADA that morale
20 itself is not enough. You have to show the
21 morale's effect on how -- is the business
22 effectively being able to serve its customers?
23 Are the employees objectively overloaded such
24 that they can't do their job? There has to be
25 some actual evidence in the record that goes

1 beyond morale. And it certainly can't be what
2 we have here, where the post office had an
3 accommodation that was working and just
4 abandoned it.

5 JUSTICE KAVANAUGH: Thank you.

6 CHIEF JUSTICE ROBERTS: Justice
7 Barrett?

8 JUSTICE BARRETT: Well, I mean, I have
9 some of those same concerns because it seems to
10 me in the ADA context, unlike this context, you
11 may have fewer accommodation requests. I mean,
12 you might have many religious people in a
13 workplace seeking the same accommodation for
14 Sundays off or -- or other kinds of
15 accommodations.

16 And I guess it seems to me, as Justice
17 Kavanaugh said, morale can be very important.
18 It kind of seems to me that you're defining
19 conduct of the business as the bottom line, like
20 you want a dollar amount on it. So, if you lose
21 efficiency and you want to measure, like, well,
22 we're not able to deliver as many Amazon
23 packages, so it's costing us some of our
24 contract. We're not as able to sell as many
25 groceries, or we have to close early on Sundays

1 because we can't cover it and we're losing the
2 sales in that point -- part of the shift.

3 I mean, what if -- you know, what if
4 it's -- just it's morale. You know, maybe
5 employees aren't -- I mean, and things that
6 might be very difficult to prove and put a
7 dollar amount on, employees aren't as productive
8 because they're grumbling, they're not willing
9 to kind of go the extra mile, put their best
10 foot forward?

11 Those might be very difficult things
12 to put a dollar amount, on or the dollar amount
13 might be small, but why wouldn't they be things
14 that affected the conduct of the business?

15 MR. STREETT: We do not advocate for a
16 dollar amount test. It just needs to be
17 concrete evidence that the employer is not able
18 to -- to carry out its operations, and that is
19 something that the employer has the burden to
20 prove.

21 But we wouldn't accept, for example,
22 in the ADA or in the Pregnant Workers Fairness
23 Act context, that workers are upset because
24 they're having to pick up a little bit of slack
25 for their pregnant coworker or for their

1 disabled coworker. That comes up in all the
2 cases, and the cases always say morale itself is
3 not enough because that just opens up the
4 floodgates.

5 JUSTICE BARRETT: So give me an
6 example of when it wouldn't be a dollar amount.
7 When you say "affect the operations of the
8 business," that -- that doesn't sound like -- I
9 realize you're saying morale isn't enough, but
10 "affect the operation of the business," give me
11 an example of when the effect on coworkers would
12 do that.

13 MR. STREETT: Well, when a coworker
14 quits would be an obvious example.

15 JUSTICE BARRETT: Quits because of
16 morale, so it's just like morale has to get so
17 bad, the employer has to wait until morale is so
18 bad that employ -- that employees actually quit?

19 MR. STREETT: That's not our position,
20 Your Honor, but that is an example of when
21 morale would have a concrete effect, and we have
22 the benefit of looking to New York and
23 California, which has this test, and --

24 JUSTICE BARRETT: And when do they say
25 it's enough?

1 MR. STREETT: It's the -- similar to
2 what's the case in the ADA. It's not enough to
3 have morale issues. It's not enough to just
4 have grumbling. But, if you -- if the employee
5 become -- the employer becomes shorthanded or
6 the employees become so overburdened that they
7 can't carry out their job, then that has an
8 effect on the business. It doesn't need to be
9 quantifiable in dollars and cents, but these are
10 all context-specific cases.

11 JUSTICE BARRETT: But it sounds to me
12 like you're saying morale is not enough unless
13 someone actually quits. So, you know, if on
14 Friday it's very clear to the employer that
15 morale is at an all-time low, it -- it's not --
16 it's not good enough, but on Monday, after one
17 employee is actually driven to quit, then it's
18 enough?

19 MR. STREETT: No, Your Honor, the
20 dividing line would not just be quitting. It
21 would -- you know, there's -- we hear about
22 quiet quitting today or individuals who are so
23 overburdened by an accommodation that they
24 cannot do the work in -- in the course of the
25 day. So those would be --

1 JUSTICE BARRETT: Can that go to the
2 reasonableness of the accommodation? I mean, I
3 recognize, you know, that we've suggested that
4 reasonable accommodation means something that
5 eliminates the conflict between the religion and
6 the duty performed -- that needs to be
7 performed, but it seems to me that maybe this
8 goes to reasonableness of the accommodation. If
9 you're in the rural grocery store and the two
10 other employees have to pick up all the shifts,
11 maybe that's not reasonable, or does it always
12 have to be measured, in your view, under that
13 substantial or difficulty test?

14 MR. STREETT: I think that's an
15 important point, Your Honor, that under the
16 reasonable accommodation prong, which, of
17 course, is not before the Court today --

18 JUSTICE BARRETT: Right.

19 MR. STREETT: -- but the employer has
20 flexibility to select an accommodation that's
21 not the religious employee's preferred
22 accommodation, and as part of making that
23 reasonable accommodation, the employer can take
24 into account the effect on the coworkers or take
25 into account the effect on the business.

1 And, of course, that's what we had
2 here. This is not a get-out-of-work-free card
3 for Mr. Groff. He volunteered to work on
4 Saturdays. He volunteered to work on non-Sunday
5 holidays. And it simply shifted around the
6 shifts that individuals were working.

7 JUSTICE BARRETT: Thank you.

8 CHIEF JUSTICE ROBERTS: Justice
9 Jackson?

10 JUSTICE JACKSON: Yes. Sorry. Can
11 you hear me?

12 Justice Kavanaugh asked you about the
13 government's substantial costs test, and I
14 thought I heard you say that sounds pretty good
15 to me, but the problem is in the application.

16 So I guess I'm trying to understand,
17 is there any daylight between the test that you
18 are advocating for, significant difficulty and
19 expense, and the government's test, substantial
20 costs? They seem pretty synonymous to me. So
21 can you help me figure out the difference?

22 MR. STREETT: Certainly, Your Honor.
23 We know what significant difficulty and expense
24 means because it's been applied under these
25 other statutes, which employers are already

1 applying every day and New York and California
2 are applying.

3 I don't know what "substantial costs"
4 means because those are just two words on a
5 page. I -- the only way to tell what that means
6 is to look at how the government applied them
7 and how Hardison applied them.

8 JUSTICE JACKSON: So do you have an
9 example of -- I mean, the government has written
10 a brief. You've written a brief. There are two
11 different standards in them. Can you give us an
12 example of a case that would come out
13 differently under the different tests?

14 MR. STREETT: Certainly, Your Honor.
15 Paying a hundred dollars a week to somebody to
16 attract them to take on a Sabbath shift, that
17 would probably not be an undue hardship under
18 our test, especially for a larger employer. But
19 it -- that's the holding of Hardison, and that
20 would be an undue hardship under the
21 government's test.

22 Denying a single coworker's shift
23 preference, the government says that that's --
24 that's an undue hardship on --

25 JUSTICE JACKSON: Because of

1 substantial costs being the test?

2 MR. STREETT: Well, that's a question
3 for the government, I guess, how substantial
4 costs links up with its different --

5 JUSTICE JACKSON: All right. Let me
6 ask you another question then. Just one more.
7 With respect to the questions about the
8 Establishment Clause and the shifting views as
9 to what the Constitution permits, is there any
10 impediment to Congress's acting now? I mean,
11 setting aside the fact that there may have been
12 -- that there's been a change in terms of the
13 Court, presumably, Congress knows that and could
14 change the statute now, right?

15 MR. STREETT: Absolutely. Congress
16 could change the statute now, and the question
17 is just whether this Court should place on
18 Congress's shoulders the burden of this Court's
19 error in Hardison.

20 JUSTICE JACKSON: But -- but -- well,
21 that assumes that that's the reason why Congress
22 picked this particular test, but, I mean,
23 isn't -- isn't this a policy question at bottom
24 for Congress? And I guess I'm a little worried
25 about the -- the history of people going to

1 Congress and the many, many bills apparently --
2 you know, Hardison has been on Congress's radar
3 screen for a very long time, and they've never
4 changed it. And I guess I'm concerned that, you
5 know, a person could fail to get in Congress
6 what they want with respect to changing the
7 statutory standard and then just come to the
8 court and say you give it to us.

9 Why shouldn't we wait for Congress?
10 Now that the, you know, law has shifted, as
11 Justice Alito pointed out, why isn't this the
12 opportunity for them to act?

13 MR. STREETT: We agree wholeheartedly
14 that this is a policy question for Congress, but
15 Congress answered that question in 1972 when it
16 enacted the words "undue hardship on the conduct
17 of the employer's business."

18 JUSTICE JACKSON: So is that an
19 impediment for Congress to revisit it today?
20 What -- do they have a similar stare decisis
21 scenario?

22 MR. STREETT: No. Of course, Congress
23 could address it today, and the question before
24 the Court is, of course, under the stare decisis
25 factors, when the reasoning has been eroded,

1 when the government's not even defending the
2 reasoning of the test, whether this Court should
3 go to the text and interpret it in a -- in a way
4 according with plain meaning.

5 JUSTICE JACKSON: Thank you.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 General Prelogar.

9 ORAL ARGUMENT OF GEN. ELIZABETH B. PRELOGAR
10 ON BEHALF OF THE RESPONDENT

11 GENERAL PRELOGAR: Mr. Chief Justice,
12 and may it please the Court:

13 For almost 50 years, courts have
14 applied Hardison when analyzing undue hardship
15 under Title VII. A substantial body of case law
16 has developed to guide that context-dependent
17 analysis, and that case law provides meaningful
18 protection to religious observants.

19 Petitioner asks this Court to throw
20 all that away and overrule Hardison. But he
21 can't overcome the strong stare decisis weight
22 this Court gives to its statutory holdings. His
23 argument boils down to a claim that Hardison was
24 wrong because it insufficiently protects
25 religious employees.

1 But that is a policy argument that he
2 should direct to Congress. And it ultimately
3 reduces to the claim that it was wrongly
4 decided, which this Court has said over and over
5 again is not enough in the statutory
6 stare decisis context.

7 Petitioner is also wrong about
8 Hardison's effects. Lower courts and the EEOC
9 have applied the "more than de minimis cost"
10 language in light of Hardison's facts. That
11 means that employers aren't required to
12 regularly pay overtime wages or regularly
13 operate shorthanded. But the EEOC's guidelines
14 recognize that employers can be required to bear
15 other costs, like infrequent payment of premium
16 wages. And the burden rests at all times on the
17 employer to demonstrate undue hardship with
18 concrete evidence, not with speculation.

19 Applying those principles, lower
20 courts frequently deny undue hardship defenses.
21 So there is no justification now to dispense
22 with Hardison and discard all of that precedent.

23 Justice Kavanaugh, Justice Barrett,
24 you asked some questions about the facts here.
25 The lower courts correctly found an undue

1 hardship on these facts. Petitioner's job
2 specifically required him to work on Sundays.
3 Exempting him from work each and every Sunday
4 would have violated his coworkers' contractual
5 rights at the post office under that MOU as to
6 how to allocate these undesirable Sunday shifts.
7 And his absences created direct concrete burdens
8 on other carriers who had to stay on their
9 shifts longer to get the mail delivered. That
10 caused problems with the timely delivery of
11 mail, and it actually produced employee
12 retention problems, with one carrier quitting
13 and another carrier transferring and another
14 carrier filing a union grievance.

15 That is an undue hardship under any
16 reasonable standard.

17 I welcome the Court's questions.

18 JUSTICE THOMAS: General, this may be
19 a problem unique to me, but could you explain to
20 me why you think that Hardison decided a case
21 under the amended Title VII?

22 GENERAL PRELOGAR: Yes, of course.

23 JUSTICE THOMAS: When I look at the
24 court of appeals' opinion and the district court
25 opinion, they both refer to the regulations that

1 are being interpreted.

2 GENERAL PRELOGAR: So I think this
3 Court's decision in Hardison, Justice Thomas,
4 clearly resolved the meaning of the 1972 version
5 of the statute, because there was an open
6 question in the case about which version of the
7 statute applied, whether 1972 or the predecessor
8 version. And both Hardison and the U.S.
9 Government in the case said there was an issue
10 of retroactivity, and the 1972 statute should be
11 applied in the case.

12 And the Court ultimately resolved that
13 issue by saying the 1972 statute and its undue
14 hardship standard carries the same meaning as
15 the predecessor version as interpreted in the
16 light of that EEOC guidance.

17 So it was essential to the Court's
18 decision that it didn't have to resolve
19 retroactivity, that it determined that the 1972
20 undue hardship standard had the same meaning as
21 the standard it was applying in Hardison itself.

22 And maybe another way to put this is
23 to say that, if there was any possibility of
24 daylight with the 1972 statute having a -- a
25 higher burden on employers, a different undue

1 hardship standard, then the Court would have had
2 to resolve that issue.

3 It couldn't have been said, it's
4 unnecessary to determine which statute actually
5 applies here, because that could have been the
6 make-or-break difference in whether Hardison
7 prevailed.

8 So I just don't think there's any way
9 now to say that was dicta or this isn't a square
10 holding on the meaning of the 1972 version,
11 and -- and that's of course what this Court
12 itself has recognized in cases like Ansonia
13 Board of Education where the Court treated
14 Hardison as a -- a -- an authoritative
15 interpretation --

16 JUSTICE THOMAS: Well --

17 GENERAL PRELOGAR: -- under the 1978.

18 JUSTICE THOMAS: I just -- I just
19 think it's difficult because when I look at the
20 lower court opinions, they do not go through
21 these gymnastics, but, that aside, the -- if you
22 just look at the words, the plain meaning of the
23 words "undue burden," in any other context, it
24 could be -- and -- and some of our
25 constitutional cases or even under ADA, which I

1 understand is -- is different -- is defined
2 differently, but how do you square that term,
3 "undue burden," with de minimis?

4 The -- the -- I don't know how
5 something -- you could say the standard is
6 de minimis and at the same time that captures
7 the undue burden standard that's in the statute.

8 GENERAL PRELOGAR: So I of course
9 acknowledge that if you focused only on those
10 terms more than de minimis in isolation divorced
11 from all of the analysis in Hardison, then I
12 think it's imprecise and it could be subject to
13 this kind of confusion.

14 But our basic pitch here is that this
15 is a context-based inquiry that necessarily
16 requires the application of a standard like that
17 to a particular fact pattern. And here Hardison
18 has properly been applied in the four-plus
19 decades since in light of its facts.

20 This isn't some new interpretation
21 that I'm suggesting for purposes of this case.
22 This was the EEOC's determination just three
23 years after Hardison in 1980 when it published
24 its guidelines and said, we will interpret more
25 than de minimis in light of the particular

1 accommodations and the costs that the Court
2 confronted in Hardison.

3 And as Justice Kavanaugh noted, the
4 Court alternated. It described it at other
5 points in the opinion in 14 -- footnote 14 as
6 substantial costs and substantial expenditures.

7 So that has been the way that the EEOC
8 and in the lower courts over 46 years have
9 essentially, we think, properly interpreted that
10 language in light of the context of the case.

11 JUSTICE ALITO: General, I'm really
12 struck by your statement that, regardless of
13 what Hardison says, for the last 40 or 50 years,
14 the EEOC and the lower courts have interpreted
15 the decision in a way that properly respects the
16 rights of minority religions.

17 I'm really struck by that because we
18 have amicus briefs here by many representatives
19 of many minority religions, Muslims, Hindus,
20 Orthodox Jews, Seventh Day Adventists, and they
21 all say that that is just not true, and that
22 Hardison has violated their right to religious
23 liberty.

24 Are they wrong? They don't -- they --
25 they -- they misunderstand what the lower courts

1 and the EEOC has done?

2 GENERAL PRELOGAR: In our view,
3 they're not accurately portraying how Hardison
4 has actually played out in the lower courts and
5 the substantial zone of protection for religious
6 exercise that lower courts have recognized in
7 light -- in light of Hardison.

8 And if you are looking for more
9 information to try to get a handle on the -- the
10 wealth of case law out there applying Hardison,
11 I'd urge the Court to consult the EEOC's
12 compliance manual.

13 We cite the manual throughout our
14 brief and it provides, I think, an excellent
15 overview of the types of accommodation claims
16 that come up again and again, and the types of
17 lines that courts have drawn through this
18 context-based approach taking account of
19 Hardison's facts.

20 And it's just incorrect to say that
21 there is not a substantial amount of
22 accommodation happening and that courts are just
23 reflexively denying these claims.

24 JUSTICE ALITO: So all --

25 GENERAL PRELOGAR: That's not the case

1 here.

2 JUSTICE ALITO: -- all of these -- all
3 of these groups -- groups actually misunderstand
4 the effects that Hardison has had on -- on their
5 members. And let me ask you a question about
6 premium pay.

7 I don't know whether that means
8 premium pay or a premium pay or a premium pay, I
9 don't know whether it's super-duper premium pay.

10 Let me give you an -- a hypothetical.
11 Say Amazon has to offer a 16-hour -- \$16 an hour
12 rate instead of \$15 an hour rate to get a
13 consistent volunteer to take a Saturday --
14 Saturday shift for a Jehovah's Witness or an
15 Orthodox Jew.

16 Is that -- is that an undue hardship?

17 GENERAL PRELOGAR: So the line that we
18 understand Hardison to have drawn is based on
19 the idea that you would have to incur
20 substantial overtime costs on a regular ongoing
21 basis.

22 And I don't think that it depends
23 entirely on the ultimate at-the-end-of-the-day
24 out-of-pocket costs for the employer, because I
25 acknowledge in the Amazon example, even if it

1 were a significant delta and it was much greater
2 wages, Amazon could probably afford that. But
3 instead I think this has to go to the nature of
4 that type of accommodation.

5 JUSTICE ALITO: What's the answer to
6 my question? It's a dollar an hour more and its
7 Amazon --

8 GENERAL PRELOGAR: I would want to
9 know --

10 JUSTICE ALITO: -- or it's Walmart or
11 it's the old TWA, but it's regular.

12 Is that -- is -- is -- is that an
13 undue hardship, yes or no?

14 GENERAL PRELOGAR: I'm not sure that
15 --

16 JUSTICE ALITO: Can you answer that
17 for me?

18 GENERAL PRELOGAR: -- it would be
19 proper to characterize a dollar an hour
20 difference as -- as premium overtime wages. I
21 think there would be an initial fact questions
22 about the different levels at which Amazon
23 reimburses its employees.

24 JUSTICE ALITO: Okay. So premium --

25 GENERAL PRELOGAR: But if I could --

1 JUSTICE ALITO: -- premium --

2 GENERAL PRELOGAR: -- highly engage
3 with a person --

4 JUSTICE ALITO: -- really, General,
5 could you please answer my question? Premium
6 doesn't mean just anything above the regular
7 wage; is that what you're saying?

8 GENERAL PRELOGAR: We're interpreting
9 it the way the Court focused on that in
10 Hardison. There I believe it was time and a
11 half or maybe double time to fill those shifts
12 and the Court characterized that as a regular
13 payment of overtime wages that crossed the line.

14 But it's not just about how to --

15 JUSTICE ALITO: So I -- I take that --
16 I take that to mean that the premium pay is not
17 just anything more than the ordinary pay. It
18 has to be substantially more than the ordinary
19 pay, right?

20 GENERAL PRELOGAR: I think that that
21 is consistent with the Court's decision in
22 Hardison, but I want to emphasize as well, that
23 the way that an accommodation ordinarily
24 operates is to provide some kind of flexibility
25 that allows the employee to complete his work

1 requirements without having that conflict with
2 his religious belief.

3 And one of the reasons why I think the
4 Court drew the distinction with regular payment
5 of overtime wages is that it's a different type
6 of accommodation. It's exempting the employer
7 on an ongoing permanent basis from doing that
8 portion of his work.

9 So I think it actually tracks a little
10 bit with the kinds of questions that Justice
11 Barrett was asking about what's the nature of a
12 reasonable accommodation in the first place,
13 although I recognize that's not the way that the
14 Court thought about the issue in Hardison.

15 JUSTICE GORSUCH: General, I'd -- I'd
16 like to see if -- if there's some common ground
17 that we -- that we can work off of.

18 First, you -- you emphasize that any
19 inquiry under the test here should be
20 context-dependent.

21 GENERAL PRELOGAR: Yes.

22 JUSTICE GORSUCH: And I think your
23 friend on the other side agrees with that. It's
24 going to depend on the size of the employer, the
25 nature of the request, what reasonable options

1 are available to the employer, et cetera.

2 GENERAL PRELOGAR: That's right.

3 JUSTICE GORSUCH: So that's common
4 ground. Okay.

5 I think there's common ground, too,
6 that de minimis can't be the test, in isolation
7 at least, because Congress doesn't pass civil
8 rights legislation to have de minimis effect,
9 right? We don't think of the civil rights laws
10 as trifling which is the definition of
11 de minimis.

12 The law says, since time immemorial,
13 you know, that the law does not concern itself
14 with trifles.

15 So is that -- is that common ground as
16 well?

17 GENERAL PRELOGAR: Yes, it is common
18 ground. You should interpret that language in
19 light of the facts there.

20 JUSTICE GORSUCH: Okay. And so I
21 think, then, that that takes us to a third
22 question I have, which is, I think your test is
23 the substantial cost test, and your friend's is
24 the significant difficulty or expense test.

25 Is that -- is that a fair summary of

1 the kind of the nub of the dispute?

2 GENERAL PRELOGAR: So I think I might
3 be anticipating your next question but I just
4 want to clarify that I wouldn't call it a
5 substantial cost test, because we do have a
6 concern with the Court articulating some new
7 verbal formulation if that calls into question
8 the way that the Commission and the lower courts
9 have been applying Hardison for the past 46
10 years.

11 We think that those results are
12 consistent with the -- the facts of Hardison and
13 the Court's observation there that it's
14 substantial costs across the line so I don't
15 want to resist that at all. That is common
16 ground.

17 But I do have concern with the Court
18 overruling Hardison or at least suggesting that
19 there is a -- a brand new standard with all of
20 the details having to be filled in anew because
21 we think that already that case law is drawing
22 the right lines.

23 JUSTICE GORSUCH: And I think you are
24 anticipating my next question, as you usually
25 do.

1 (Laughter.)

2 JUSTICE GORSUCH: But substantial
3 costs, that at least it seems to me in some
4 abstract level is common ground, fair?

5 GENERAL PRELOGAR: Yes, I would
6 concede it at the abstract level.

7 JUSTICE GORSUCH: And -- and then the
8 question becomes do we need to in this case get
9 into any verbal formulations. And you're
10 encouraging us not to do so.

11 GENERAL PRELOGAR: That's right.
12 And -- and -- and just to put it all out there,
13 my concern is that any verbal formulation the
14 Court might choose as a replacement could
15 potentially call into question this --

16 JUSTICE GORSUCH: Right.

17 GENERAL PRELOGAR: -- well-developed
18 body of law, but if you were --

19 JUSTICE GORSUCH: So if we were -- if
20 we were simply to say that the courts -- some
21 courts have taken this de minimis language
22 rather seriously and no one before us defends it
23 and it wasn't even briefed in -- in Hardison
24 itself, that wasn't something that anybody
25 advocated for, even in Hardison, that maybe we

1 could do some -- a good day's work and put a
2 period at the end of it by saying that that is
3 not the law.

4 GENERAL PRELOGAR: I would agree with
5 that, and I think that that could be a useful
6 clarification for any courts that are led astray
7 by that de minimis language --

8 JUSTICE GORSUCH: And then just remand
9 --

10 GENERAL PRELOGAR: -- but I would urge
11 the Court --

12 JUSTICE GORSUCH: -- remand the matter
13 -- I'm sorry to interrupt, but just --

14 GENERAL PRELOGAR: Yeah.

15 JUSTICE GORSUCH: And then remand the
16 matter back and be done with it?

17 GENERAL PRELOGAR: If I could add one
18 small piece on the remand --

19 JUSTICE GORSUCH: Of course.

20 GENERAL PRELOGAR: -- which is to
21 please confirm that the EEOC has properly
22 understood Hardison in light of the facts --

23 JUSTICE GORSUCH: Well --

24 GENERAL PRELOGAR: -- and that the
25 Court is not overruling Hardison on its facts --

1 (Laughter.)

2 GENERAL PRELOGAR: -- because that --
3 I think that is really where the pressure point
4 is here.

5 JUSTICE GORSUCH: But -- but -- but do
6 we need to do -- I have the pressure point,
7 okay. So I guess I would just wonder whether
8 the Court needs to get into that today. If
9 there is so much common ground here between the
10 parties and really between the parties and
11 Hardison that, you know, some courts -- and it's
12 been a serious misunderstanding -- not all
13 courts, but some courts have taken this
14 "de minimis" language and run with it and say
15 anything more than a trifling will -- will --
16 will get the employer out of any concerns here,
17 and that's wrong and we all agree that's wrong,
18 why can't we just say that and be done with it
19 and be silent as to the rest of it?

20 GENERAL PRELOGAR: Well, I think
21 Petitioner is asking this Court to do much more.
22 He's asking the Court to overrule --

23 JUSTICE GORSUCH: And now you are --
24 and now you are too --

25 GENERAL PRELOGAR: I'm asking you to

1 reject --

2 JUSTICE GORSUCH: -- and I'm resisting
3 both of you.

4 GENERAL PRELOGAR: -- his arguments.

5 JUSTICE GORSUCH: Okay. And he's
6 asking me to reject yours, and perhaps maybe
7 that's another day's problem for us. And it's a
8 -- it's a -- it's a significant problem, but --
9 but does the Court need to go there? I mean, is
10 there any necessity for us to do that?

11 GENERAL PRELOGAR: I think, if this
12 Court made clear that the "de minimis" language
13 should not be taken literally to mean every
14 dollar above a trifle is immunizing the
15 employers from liability, that is absolutely a
16 correct statement of the law. It's consistent
17 with Hardison. It does not require overruling
18 Hardison. And I would be very happy with that
19 clarification.

20 JUSTICE KAGAN: Well, we do have to
21 reach a disposition line. So how do we reach
22 the disposition line on Justice Gorsuch's
23 suggestion?

24 GENERAL PRELOGAR: So our view is that
25 the facts here clearly qualify as an undue

1 hardship under Hardison and under any reasonable
2 understanding of the facts at issue in that
3 case, and it's for all of the reasons I tried to
4 explain.

5 You know, this was not some minor
6 inconvenience to the Postal Service. The
7 requested accommodation here had manifold
8 impacts both on coworkers and on USPS's ability
9 to deliver the mail.

10 JUSTICE KAGAN: So there would be no
11 basis for vacating and remand in light of this
12 universal agreement that we're not talking about
13 trifles?

14 GENERAL PRELOGAR: That's correct. I
15 -- there is -- there is no basis on which to
16 conclude that we won on a trifle. It was far,
17 far more significant than that.

18 JUSTICE BARRETT: But why wouldn't we
19 vacate and remand to let the Third Circuit know
20 -- like let's imagine that we took Justice
21 Gorsuch's approach and said, you know, to be
22 clear -- and I think lots of courts of appeals
23 are and, in fact, the EEOC guidelines for
24 employers, the more informal sheet, says
25 anything but minimal costs. That makes it sound

1 like trifling.

2 So why wouldn't it make sense to
3 vacate and remand and say, you know, to be
4 clear -- this is all assuming, right -- but to
5 be clear, de minimis doesn't mean trifling
6 costs, any costs, minimal costs, unless you
7 were -- you know, maybe you were led astray by
8 that, and we want you to apply the Solicitor
9 General's correct understanding of Hardison,
10 which requires you to assess whether there's a
11 substantial -- what is it, substantial burden,
12 substantial hardship -- substantial hardship?

13 GENERAL PRELOGAR: At that point, I
14 would just use the statutory language, "undue
15 hardship." Justice Barrett, obviously, I
16 recognize that's an approach that's open to the
17 Court. I think that if you look at the Third
18 Circuit's decision, there is nothing in there to
19 indicate that the court's decision was driven by
20 this idea that anything over a trifle was too
21 much. Instead, the court carefully parsed the
22 evidence in the case and pointed to the really
23 significant impacts that I'm emphasizing here
24 about coworker burdens, people quitting, people
25 transferring. There was a threatened boycott on

1 one Sunday and a union grievance filed.

2 So, you know, I think that,
3 ultimately, the Third Circuit would reach the
4 right result again on these facts, and I don't
5 think it's necessary to send them down that
6 road. But I, of course, acknowledge, if you
7 wanted to provide this clarification and send it
8 back, you could.

9 JUSTICE BARRETT: Let me ask you --

10 CHIEF JUSTICE ROBERTS: Well --

11 JUSTICE BARRETT: -- just one other
12 question. I guess one thing that -- that
13 concerns me about your proposed approach is
14 that, you know, as Justice Gorsuch said -- and
15 that's why basically no one's defending this --
16 I mean, we have an amicus brief from Americans
17 -- you know, Americans for Separation of Church
18 and State saying that Hardison was wrong.

19 Since no one's defending the test, and
20 I feel like you're going back and you're
21 rationalizing it and you're saying here's why
22 what the EEOC has said is consistent with a more
23 robust understanding of the de minimis test that
24 Hardison announced, you know, here's this
25 body -- I mean, are we supposed to go back and

1 look at this body of 40 years of court of
2 appeals' law and -- and assure ourselves that,
3 in fact, it's consistent with this test.

4 If this language, "de minimis," has
5 been leading courts of appeals astray, what is
6 the point of -- of retaining that formulation of
7 the standard, which everybody agrees has led
8 courts of appeals astray?

9 GENERAL PRELOGAR: So I -- I recognize
10 and don't want to suggest that I have particular
11 attachment to the four words "more than
12 de minimis" in isolation, but I do have great
13 attachment to the body of law that has developed
14 in reliance on Hardison and using the costs and
15 the accommodations at issue there as one
16 benchmark to try to sort out going forward the
17 types of accommodations that will be required.

18 CHIEF JUSTICE ROBERTS: Well --

19 GENERAL PRELOGAR: And so the thing
20 I'm trying to avoid is this idea that the Court
21 would just throw it all up for grabs and say we
22 have to do this over under some new standard and
23 this case law is irrelevant for helping to guide
24 employers in understanding their obligations and
25 courts in applying the statute in those

1 recurring fact patterns.

2 CHIEF JUSTICE ROBERTS: Well, you want
3 to look at the development of the law. Of
4 course, the law has developed in this area in
5 other respects too. It is not the case, as I
6 think people thought it was at Hardison, that
7 it's -- you -- you can't treat people's
8 religious exercise any better than anyone else.
9 In other words, strict neutrality is -- is no
10 longer understood to be the law. It was not the
11 case when Hardison was decided that you had
12 cases like Hosanna-Tabor and Espinoza and Carson
13 saying there really is no Establishment Clause
14 problem if you make accommodations for people's
15 religious -- religious belief.

16 So, if you're going to look at this
17 under current law, it's not clear that those
18 cases would come out -- Hardison, for example --
19 would come out the same way. In other words, if
20 we're going to do this and say "de minimis"
21 doesn't really mean de minimis, it means
22 something more significant, if you're trying --
23 if you're in the lower courts and you're trying
24 to figure out, well, what exactly does that
25 mean, you will, of course, have to take into

1 account our religious jurisprudence as it exists
2 today, right?

3 GENERAL PRELOGAR: Yes, but I don't
4 think that there is any evidence that the lower
5 courts themselves have misunderstood Hardison to
6 apply a strict neutrality principle or to rest
7 on these kinds of Establishment Clause concerns
8 that appear nowhere on the face of the decision.
9 So I don't think that those developments in the
10 law call into question what the lower courts
11 have done, looking instead at that separate
12 question of, when do the particular burdens and
13 costs on an employer cross that line and are
14 rightly characterized as undue?

15 And, in fact, this kind of strict
16 neutrality principle, if it had really been what
17 the Court in Hardison intended, would have made
18 it wholly unnecessary to engage in any analysis
19 of undue hardship. So I don't think that that's
20 a tenable way to read the decision.

21 JUSTICE JACKSON: But, General --

22 CHIEF JUSTICE ROBERTS: Well, but --

23 JUSTICE JACKSON: Oh.

24 CHIEF JUSTICE ROBERTS: No, go ahead.

25 JUSTICE JACKSON: General, how do you

1 respond to counsel on the other side's point
2 that we have undue hardship working in other
3 statutes and that there's a whole body of law
4 related to the significant-difficulty-and-
5 expense test? So, if we're going to be
6 revisiting Hardison anyway, even to clarify it
7 in the way that Justice Gorsuch suggests, what's
8 your response to his suggestion that we take
9 that test since it also has case law that has
10 developed?

11 GENERAL PRELOGAR: So let me respond
12 with some practical concerns about trying to
13 transplant ADA case law to this area, but then
14 I'd also like to take a shot at describing why I
15 think that would be legally flawed here.

16 Just on the practical point, it's not
17 possible to pick up and uproot the ADA case law
18 and -- and transplant it in full to this new
19 context, and the reason for that is because
20 there are signals in the ADA itself that
21 Congress had in mind very different potential
22 types of accommodations, things like having to
23 modify your existing facilities and undergo
24 costly renovations to make them accessible to
25 those with disabilities or hire an entire

1 additional employee to function as a sign
2 language interpreter.

3 And I don't think it would be
4 reasonable, given the differences in the
5 statutory structure, to say, well, that's not
6 available in Title VII, but we're still going to
7 say that the ADA case law carries its full
8 meaning.

9 Instead, what you'd have to do is
10 start over, and you could use significant
11 difficulty and expense, but at that point, you
12 recognize that there's daylight between the
13 statutes and it's a content-less standard.
14 You're still going to have to engage in all of
15 the hard work of deriving meaning by applying
16 the standard to repeat fact patterns.

17 That's the work that's already been
18 done under Hardison in a way that we think is
19 very much protecting religious exercise in the
20 workplace, so I don't think it makes sense to
21 start over under the ADA's standard.

22 JUSTICE JACKSON: So you don't think
23 there's confusion that is deriving from having
24 different undue burden standards operating with
25 respect to different types of alleged

1 discrimination?

2 GENERAL PRELOGAR: No, not at all, and
3 I think it could actually boomerang into
4 additional confusion if courts tried to take the
5 ADA standard but recognized that there were
6 pieces of that that are wholly inapplicable and
7 can't transfer over.

8 And just on the legal piece, if I
9 could finish up on that, you know, I think
10 there's a real problem here when we're in the
11 context of statutory stare decisis where the
12 Court had already authoritatively interpreted
13 Title VII and Congress then came along after and
14 enacted the ADA and recognized that its
15 definition of "undue hardship" was a departure
16 from what the Court had done and how Title VII
17 operated. It would then be particularly
18 anomalous for the Court to say, we're going to
19 go ahead and port over the ADA definition even
20 though Congress has been repeatedly asked to do
21 so with bills introduced in every Congress
22 between 1994 and 2013, many to codify this
23 precise standard, and Congress did not enact
24 those bills.

25 JUSTICE KAGAN: And, General, can I

1 take you back to something that you said to
2 Justice Gorsuch and Justice Barrett? Because,
3 when you were agreeing that this is not a -- a
4 line about, you know, trivialities, but then I
5 think you said at some point, but it would not
6 be a good thing just to say, oh, well, you know,
7 so now it's a substantial burden test going
8 forward, and -- and leave it at that.

9 And why is that?

10 GENERAL PRELOGAR: Right. Our concern
11 with that is, if the Court were to announce a
12 new standard, I think it would come with all the
13 costs of destabilizing this area of the law and
14 unsettling whether the Court means to overrule
15 Hardison on its facts, for example, or
16 potentially call into question all of the
17 established areas of law that have developed
18 that we think have drawn the right lines here.

19 And if I could, there are really only
20 three categories where religious accommodation
21 requests come up again and again, and I think it
22 might be helpful to the Court if I provide a
23 really quick summary of those three categories,
24 because I think it shows how the law has
25 developed in this area.

1 The first category is scheduling
2 changes. That can include things like Sabbath
3 observance obviously, but also things like
4 midday prayer breaks or wanting to come in later
5 on a Sunday to permit church service.

6 And in that area, courts regularly are
7 requiring employers to provide flexible work
8 schedules if the work can be shifted to a
9 different time of day. So you take your midday
10 prayer break, but then you make it up on the
11 back end. That is what courts are doing today.

12 Also, you can facilitate voluntary
13 shift swaps. That is a common way to deal with
14 Sabbath observance. And if those fail, you can
15 consider lateral job transfer to a different
16 position where there's not the Sabbath conflict
17 for that accommodation.

18 In the second category, it's dress and
19 grooming policies, and there today, courts are
20 regularly granting accommodations and rejecting
21 undue hardship defenses. The narrow category of
22 cases where that's not happening is when there's
23 a -- a legitimate safety concern, like you work
24 in a steel mill and you can't modify the dress
25 code because wearing a skirt will interfere with

1 operating the machinery, for example.

2 The third category involves religious
3 expression in the workplace. This can include
4 displaying a religious symbol or potentially
5 needing an exemption from employer-sponsored
6 religious speech in a meeting.

7 There too, courts are regularly
8 granting accommodations, and it's only in the
9 circumstances, for example, where the religious
10 speech would amount to harassment of coworkers
11 or customers that the undue hardship defense is
12 credited.

13 JUSTICE GORSUCH: And, General, you
14 think all three of those categories under a
15 proper understanding of the law, whatever
16 standard verbal formulation one chooses, are
17 required by Title VII?

18 GENERAL PRELOGAR: Yes, we think that
19 accommodations in those categories are
20 frequently granted in line with Title VII.
21 Undue hardship defenses are frequently denied in
22 line with Title VII. And what I'm asking the
23 Court to do is not disrupt and -- and unsettle
24 that area of the law.

25 JUSTICE GORSUCH: And I don't think

1 your friend on the other side wants to unsettle
2 those decisions either, right? So that's again
3 a little more common ground amongst us.

4 GENERAL PRELOGAR: So I worry that he
5 does, because he is asking this Court to adopt a
6 brand-new standard. He has a different account.

7 He says -- his claim is that Hardison
8 has been a disaster on the ground.

9 We do not think that that is reflected
10 in the actual case law, certainly not in the
11 Commission's experience in this area.

12 JUSTICE GORSUCH: But -- but in
13 those -- I'm sorry to interrupt, but in those
14 three buckets, I think there's common ground
15 that the law would require those kinds of
16 accommodations you just outlined.

17 GENERAL PRELOGAR: So I'm -- I'm not
18 so sure. For example, let's take the facts of
19 this case. Petitioner obviously thinks that he
20 was entitled to an accommodation even though --

21 JUSTICE GORSUCH: I -- I -- actually,
22 I don't want to take the facts of this case. I
23 want to take your three buckets. I liked them.

24 GENERAL PRELOGAR: Yeah.

25 JUSTICE GORSUCH: Okay? And I'm

1 looking for common ground here, and it seems to
2 me that is common ground, that -- that -- that a
3 proper understanding of Title VII requires
4 those, even if sometimes they're more than
5 de minimis. All of those things could be more
6 than de minimis, and yet both sides agree that
7 that's what Title VII should require.

8 GENERAL PRELOGAR: Yes, and if
9 Petitioner is happy with the EEOC's guidance and
10 with the case law in this area that summarizes
11 those three buckets, then that is absolutely
12 common ground.

13 JUSTICE GORSUCH: But those three --

14 JUSTICE KAGAN: Is -- is this case in
15 the -- in the first bucket? Are you saying that
16 this case is in the first bucket?

17 GENERAL PRELOGAR: Exactly, a
18 requested scheduling change. So Sabbath cases
19 fall in the first bucket, and in all honesty --

20 JUSTICE KAGAN: So you're not saying,
21 like, all cases in the first bucket require an
22 accommodation. You're saying some cases in the
23 first bucket require an accommodation.

24 GENERAL PRELOGAR: Yes, of course. I
25 was trying to give a sensible --

1 JUSTICE KAGAN: And -- and then
2 there's a big difference as to which cases
3 require an accommodation. So I'm happy that we
4 are all kumbaya-ing together.

5 (Laughter.)

6 GENERAL PRELOGAR: My arguments don't
7 always go that way.

8 (Laughter.)

9 JUSTICE KAVANAUGH: But you're --

10 JUSTICE GORSUCH: Let me ask you just
11 --

12 JUSTICE KAVANAUGH: -- in the first --
13 go ahead.

14 JUSTICE GORSUCH: I'm sorry. Just --
15 I just wanted to follow up with one quick thing,
16 and that is just I know there are a number of
17 states -- we have a brief from, I think, 17
18 states -- that have something like a substantial
19 cost or a substantial burden and undue expense
20 test as a matter of state law.

21 Are you aware -- this is the
22 practical, on-the-ground question that the
23 government might be -- has there been any
24 problem in the administration of those -- those
25 state law tests?

1 GENERAL PRELOGAR: So I think it's far
2 fewer than 17. The examples that have been
3 cited are New York and California.

4 JUSTICE GORSUCH: No, I think we have
5 17 states.

6 GENERAL PRELOGAR: Yes, pointing to
7 those laws.

8 JUSTICE GORSUCH: Pointing to those
9 laws.

10 GENERAL PRELOGAR: But it's a small
11 number of states that have those laws. New York
12 and California are the examples my friend has
13 cited.

14 We looked at every reported decision
15 in those cases, and there are just really few
16 decisions. Many of the -- the cases tend to
17 apply and draw on the Title VII standards that
18 already exist. So it's not clear that actually
19 the -- the courts in those states, even though
20 there's different language, are applying a
21 radically different standard.

22 JUSTICE GORSUCH: Okay. Thank you.

23 JUSTICE KAVANAUGH: In the follow-up
24 on these questions, in the first bucket, my
25 understanding is you want the line to be

1 "regularly paying premium wages would be an
2 undue hardship."

3 GENERAL PRELOGAR: Or regularly
4 operating shorthanded was the other thing the
5 Court considered in Hardison.

6 JUSTICE KAVANAUGH: Okay. On
7 regularly operating shorthanded, I just want to
8 make sure, a lot of times in your brief it just
9 says "operating shorthanded." A few other times
10 it says "regularly operating shorthanded."

11 It's "regularly operating
12 shorthanded"?

13 GENERAL PRELOGAR: Yes. I'm glad to
14 have the chance to clear that up. The EEOC has
15 drawn a distinction between temporary
16 accommodations, including temporary --
17 temporarily being shorthanded, or paying premium
18 wages, for example.

19 JUSTICE KAVANAUGH: And, of course,
20 applying that to a particular set of facts is
21 challenging, as Justice Alito's questions and
22 others have pointed out, but that's the line you
23 would draw in the first bucket?

24 GENERAL PRELOGAR: That's right.
25 Those are some of the lines. Now, of course,

1 there are other types of requests that can come
2 in, and so I don't want to speak, you know --

3 JUSTICE KAVANAUGH: Yes.

4 GENERAL PRELOGAR: -- kind of
5 categorically here because it's so
6 context-dependent, but I was trying to give a
7 sense of the accommodations that are regularly
8 offered day in and day out and rightly so.

9 JUSTICE KAVANAUGH: And then on what
10 you want us to say is the standard, you haven't
11 mentioned Footnote 14 a lot, but is four --
12 Footnote 14 equivalent to de minimis -- more
13 than de minimis costs in your view? Is that
14 what Hardison was saying, or what?

15 GENERAL PRELOGAR: Yes. I think
16 Hardison was alternating between describing
17 these costs in various formulations. It used
18 more than de minimis in the portion of the
19 opinion that, of course, this Court has now
20 focused on, but it also used substantial costs
21 in that footnote.

22 JUSTICE KAVANAUGH: And the
23 footnotes -- I'll wait.

24 CHIEF JUSTICE ROBERTS: You just
25 agreed, I think, with Justice Kavanaugh that

1 regularly paying premium wages would not be --
2 it would be an undue burden, is that right?

3 GENERAL PRELOGAR: That was the
4 holding in Hardison, yes.

5 CHIEF JUSTICE ROBERTS: But your
6 discussion earlier, I forget which -- with which
7 colleague of mine, you couldn't really tell us
8 what premium wages were, so your agreement on
9 that being an undue burden is not very helpful
10 for me unless we have some idea about where the
11 agreement is. So give me a test for deciding
12 whether something is a premium wage.

13 GENERAL PRELOGAR: So I would look to
14 the facts of Hardison, which we think are the
15 best indication here and, of course, is entitled
16 to statutory stare decisis effect.

17 If I'm recalling the facts correctly
18 there, the evidence was that you would have to
19 pay time-and-a-half on an ongoing basis for the
20 duration, and the Court said that's an undue
21 hardship.

22 And I acknowledge maybe there could be
23 hard questions in this context-dependent
24 analysis in the future about whether a \$1
25 bump-up in salary should be considered premium.

1 And we're not trying to make a global argument
2 here because it's so fact-dependent and
3 context-dependent, but I think that the EEOC has
4 rightly relied on the facts of Hardison to give
5 a benchmark.

6 JUSTICE SOTOMAYOR: General, isn't it
7 --

8 CHIEF JUSTICE ROBERTS: Justice --
9 Justice Thomas?

10 JUSTICE THOMAS: General, could you
11 point me to the part of Hardison that
12 synchronizes its consideration of the regulation
13 with the new statute, the amended statute?

14 GENERAL PRELOGAR: Yes. I am flipping
15 through the opinion here because it's in one of
16 the footnotes, Justice Thomas.

17 JUSTICE THOMAS: Well, that's okay.
18 You can do it later.

19 GENERAL PRELOGAR: Okay. It's -- it's
20 -- in our brief, we cite the relevant portion of
21 Hardison where the Court made clear that it was
22 interpreting both versions of the statute to
23 have parallel meanings, and that was the exact
24 reason why the Court didn't have to resolve the
25 issue of retroactivity.

1 I think it might be Footnote 11, but
2 I'm sorry I'm not finding it.

3 JUSTICE THOMAS: That's okay. Thank
4 you.

5 CHIEF JUSTICE ROBERTS: Justice Alito?

6 JUSTICE ALITO: Well, your three
7 buckets are quite helpful, and I think the
8 argument has been productive in finding points
9 of agreement. I just wanted to follow up on a
10 few things.

11 In your second bucket, you have
12 grooming standards. So let me take you back to
13 a situation like the one in Abercrombie. You
14 have an employer who generally prohibits
15 employees from wearing anything on their heads,
16 but a Muslim woman says, I am required for
17 religious reasons to wear a scarf on my head.
18 And this links up with the issue of the reaction
19 of coworkers.

20 Suppose that the employer gets a -- a
21 fierce reaction from coworkers if it -- when it
22 says that it's inclined to provide an
23 accommodation for that Muslim woman.

24 What would you make of that situation?

25 GENERAL PRELOGAR: So I would point to

1 the EEOC guidance, which directly addresses this
2 point and makes clear that mere coworker
3 grumbling or resentment or even overt hostility
4 to religious practice and expression in the
5 workplace is not itself cognizable to factor
6 into the undue hardship inquiry.

7 Instead, coworker effects are relevant
8 only when the accommodation is creating concrete
9 burdens on the coworkers that's materially
10 changing their terms and conditions --

11 JUSTICE ALITO: Okay. Suppose that
12 then the employer has more difficulty --
13 employees quit and say this -- this employer
14 accommodates Muslims, and so we're quitting.
15 And it has more difficulty hiring people. What
16 about that?

17 GENERAL PRELOGAR: So that also cannot
18 factor into the undue hardship analysis, because
19 it would be giving effect to religious hostility
20 and animus, and the guidance on this point is
21 clear also.

22 JUSTICE ALITO: So would the employer
23 have to inquire into the reasons why these
24 employees are quitting? So if the employees say
25 we're quitting because we just want to wear hats

1 because it's fashionable, okay -- you couldn't
2 take that into account -- but they say we're
3 quitting because we don't want to accommodate
4 Muslims, then that would not be permissible?

5 GENERAL PRELOGAR: Actually, neither
6 of those should be taken into account. When the
7 -- the nature of the coworkers' dissatisfaction
8 is just the mere fact that an accommodation is
9 being provided on religious grounds, the
10 guidelines make clear that that's not a
11 cognizable form of hardship, and instead it's
12 only when the coworkers express the
13 dissatisfaction because they are actually being
14 asked to take on additional work or have more
15 undesirable shifts, for example, that that would
16 be relevant to undue hardship.

17 JUSTICE ALITO: Another question.
18 What, in your view, is the relevance of the fact
19 that a requested accommodation would be
20 inconsistent with a provision of a collective
21 bargaining agreement or a memorandum of
22 understanding that doesn't have anything to do
23 with seniority?

24 GENERAL PRELOGAR: So we think that
25 Hardison clearly held in the first holding, that

1 I didn't previously understand Petitioner to be
2 challenging, but maybe now at argument he is,
3 that it held that when there are terms of a
4 collective bargaining agreement that fix
5 employees' rights vis-à-vis one another,
6 including by assigning undesirable work through
7 a neutral system, whether that's seniority or
8 rotation or lottery, that it would be an undue
9 hardship to strip employees of their rights
10 under that kind of collective bargaining term.

11 JUSTICE ALITO: But Hardison did
12 actually say, "we agree that neither a
13 collective bargaining contract nor a seniority
14 system may be employed to violate the statute,"
15 right? And it could -- it's hard to see how it
16 could say -- put aside the question of
17 seniority, which is treated separately under
18 Title VII. It's hard to see how it could say
19 otherwise with respect to a collective
20 bargaining agreement or a memorandum of
21 understanding, right?

22 GENERAL PRELOGAR: Yes, of course.
23 And so it's not as though you could adopt an
24 overtly discriminatory term or even one that's
25 motivated by discriminatory animus and immunize

1 that from scrutiny in a collective bargaining
2 agreement. And I think that Hardison recognized
3 that point in the sentence you --

4 JUSTICE ALITO: All right. Suppose
5 that a collective bargaining agreement or
6 memorandum of understanding says the employer
7 will never grant a religious accommodation if it
8 requires anything more than a de minimis effect
9 on the employer.

10 GENERAL PRELOGAR: So I think --

11 JUSTICE ALITO: What about that?

12 GENERAL PRELOGAR: I would draw a
13 distinction, and I think this is supported by
14 Hardison, between terms and collective
15 bargaining agreements that are fixing the
16 employees' rights as it relates to one another,
17 things like allocating the scarce resource of
18 weekends off, on the one hand, and other terms
19 that aren't granting employees any rights and
20 therefore you wouldn't be taking their rights
21 away, but rather are just the employer codifying
22 certain rules.

23 I don't understand Hardison to reach
24 your hypothetical or to reach that latter
25 category. Instead, the rationale of the Court

1 was that, when you have a term of collective
2 bargaining agreement that is essential to
3 maintaining labor peace, like figuring out which
4 employees are going to have to pick up these
5 undesirable shifts, they can legitimately rely
6 on the terms of that agreement and not have
7 their rights taken away.

8 JUSTICE ALITO: I -- I -- I -- I'm not
9 sure I really understand that. So if this
10 provision, which requires strict neutrality,
11 and, therefore, adopts the de minimis test, for
12 all it's worth, "de minimis" means "de minimis,"
13 that affects both the employers -- employees who
14 might want a religious accommodation and those
15 who don't want one and might want a comparable
16 accommodation for a secular reason.

17 GENERAL PRELOGAR: Well, I think that,
18 you know, to fit within Hardison's first
19 holding, it would be necessary for the term of
20 the bargaining agreement to vest certain
21 employees with particular rights. That's the
22 contractual right not to have to work those
23 shifts, for example. And if I'm understanding
24 your hypothetical, the provision in the
25 bargaining agreement would just be protecting

1 the employer. It wouldn't be giving the
2 employees themselves any kind of rights.

3 JUSTICE ALITO: All right. Suppose it
4 does give -- it says secular employees shall
5 have the same accommodation rights as those
6 employees -- employees who may request an
7 accommodation for a secular reason have exactly
8 the same rights as an employee who requests an
9 accommodation for a religious reason.

10 GENERAL PRELOGAR: So at that point, I
11 think if you're accommodating the religious
12 reason, it would just create a parallel or
13 matching right that the person who wants the
14 exemption from the dress code to wear the hat
15 can do so. You wouldn't be taking away the
16 right from the religious person.

17 JUSTICE ALITO: On the facts of this
18 case -- in your first bucket, you say voluntary
19 shifts are fine, okay. And if there are people
20 who will voluntarily shift out of the goodness
21 of their hearts, okay, great. What if there's
22 nobody who will do it for that reason, but they
23 will do it if they get a little bit more money?

24 So on the facts of this case, do we
25 have any idea how much more it would have cost

1 the postal service, which is a huge employer, if
2 not a profitable one, a profit-making one, to
3 induce enough people to agree to cover -- to
4 cover the shifts? Do we know? Is it
5 irrelevant?

6 GENERAL PRELOGAR: So there wasn't
7 record evidence developed on this point, and
8 that wasn't an argument that Petitioner pressed,
9 as far as I'm aware, below about the payment of
10 overtime to try to incentivize additional
11 employees to volunteer.

12 But there was a lot of record evidence
13 about all of the effort the post office put into
14 try to arrange those voluntary shifts. The
15 postmaster, each and every Sunday that
16 Petitioner was scheduled, was calling around to
17 the other regional post offices trying to find
18 volunteers. And I acknowledge that it didn't
19 work each and every Sunday. That's why
20 Petitioner had the conflict. But the lower
21 courts correctly credited the good faith of the
22 postal service in trying to put into effect an
23 accommodation.

24 JUSTICE ALITO: But doesn't this most
25 of the time come down to dollar and -- dollars

1 and cents? So if you're -- if the employer is
2 going to pay people to take a shift, then the
3 shift can be covered and everybody will be
4 happy. The employee who wants a religious
5 accommodation gets a religious accommodation,
6 and the other employees who cover the shift,
7 they get more money, and so they're happy. So
8 doesn't it come down to dollars and cents and
9 don't we have to deal with the issue of dollars
10 and cents? Isn't that what this mostly will
11 come down to?

12 GENERAL PRELOGAR: There -- first of
13 all, there is certainly nothing that would
14 prohibit an employer from choosing to pay extra
15 to try to induce others to work those shifts and
16 cover them. So that's one available alternative
17 out there for certain employers that can afford
18 it and think that that would be a way to address
19 this issue.

20 But I guess the question then becomes
21 what about the employers for whom that is going
22 to be a struggle or who don't think that that is
23 appropriate when they've hired someone
24 specifically to work and be available on
25 Sundays? Should the statute impose on them the

1 regular requirement in perpetuity for the length
2 of the employment to pay those extra wages?
3 Hardison said no, and I think that's entitled to
4 statutory stare decisis effect.

5 JUSTICE ALITO: Okay. I take that to
6 mean that if it would -- if it would be a
7 struggle, then the employer can't be required to
8 pay extra. But if it wouldn't be a struggle,
9 then maybe the employer would be required to pay
10 extra, right?

11 GENERAL PRELOGAR: No. So --

12 JUSTICE ALITO: Is that what you just
13 said?

14 GENERAL PRELOGAR: No, and I'm sorry
15 if I was unclear on this point. We think that
16 this hypothetical fits squarely within
17 Hardison's first holding -- I'm sorry -- its
18 first holding about the -- the regular payment
19 of premium wages, having to pay time and a half
20 on a regular basis in order to fill that slot.

21 And the basic insight behind that, I
22 think, is that you have hired somebody to do a
23 specific job and the nature of the conflict, if
24 you can't fix it with all of these other
25 solutions that I've -- I've offered in bucket

1 one, would then effectively mean the person
2 can't do a portion of the job they were hired to
3 perform, and it would transfer to the employer
4 the responsibility to pay a lot extra in order
5 to get that filled.

6 JUSTICE ALITO: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice
8 Sotomayor?

9 JUSTICE SOTOMAYOR: What's clear to
10 me, after all this discussion, is that, as much
11 as we -- some people might want to provide
12 absolute clarity, there is none we can give, is
13 there?

14 GENERAL PRELOGAR: That's --

15 JUSTICE SOTOMAYOR: Because it's all
16 contextual.

17 GENERAL PRELOGAR: Yes.

18 JUSTICE SOTOMAYOR: And to that end,
19 there are going to be some cases where people
20 are going to be unhappy with the court's result
21 and others where they are happy. The best we
22 can do is do what Congress told us to do, just
23 to say that undue hardship excuses an employer
24 from doing that, correct?

25 GENERAL PRELOGAR: Exactly. I think

1 you've put your finger --

2 JUSTICE SOTOMAYOR: Now --

3 GENERAL PRELOGAR: -- on it, Justice
4 Sotomayor.

5 JUSTICE SOTOMAYOR: And, regrettably,
6 yes, the post office hasn't run for a profit --
7 has not worked for a profit in many, many years.
8 There's even questions of closing it down. And
9 even that dollar extra could close it down.

10 And one could argue that paying a
11 premium wage by Amazon makes no difference, but
12 at a certain point, we effect the corporation's
13 bottom line. And that's not our choice to
14 decide whether we want to do that, because the
15 economy needs to run on incentives to make
16 money, isn't -- doesn't it?

17 GENERAL PRELOGAR: Yes.

18 JUSTICE SOTOMAYOR: And so, you're
19 right, what Hardison said was there are certain
20 broad categories affecting someone's seniority
21 rights, affecting a premium -- regular premium
22 wage or regular short-handedness is going to
23 affect morale no matter how you look at it.
24 Anyone who's worked seeing delivery people work
25 during the holidays, if you pay any attention,

1 most of them are exhausted at the end of their
2 day. It costs to run extra hours, and it costs
3 to do more work. And that cost can't be
4 quantified always in money.

5 So if we take the Hardison rules or
6 holdings, that's enough, isn't it?

7 GENERAL PRELOGAR: Yes, and you don't
8 have to speculate about how that applies on the
9 facts of this case because, here, the record
10 evidence showed that during the peak season,
11 when Petitioner was unavailable, it was one
12 other carrier who had to go out each and every
13 Sunday over the holidays to deliver the mail,
14 and when he was unavailable, it was the
15 postmaster himself who had to do it on three
16 occasions, and that led to real-world costs on
17 the other employees.

18 There was similar evidence in the
19 Lancaster hub. My friend suggested it was just
20 a de minimus burden there transferring as
21 between 40 and 39 employees. But the record
22 demonstrates that given the nature of the work
23 and the number of RCAs who had to be on duty,
24 they were working at least every other weekend,
25 and the testimony showed it was often two out of

1 three weekends.

2 And so, once you start taking away
3 their weekend off, that led to the unrest and
4 the disruption of the workflow that we saw here.
5 And when Petitioner was absent, they had to stay
6 on their routes longer and later, going out
7 after dark for routes that were unfamiliar to
8 get those packages delivered.

9 That counts as real-world impact and
10 undue hardship under any reasonable standard.

11 JUSTICE SOTOMAYOR: Thank you.

12 CHIEF JUSTICE ROBERTS: Justice Kagan?

13 JUSTICE KAGAN: General, the EEOC
14 guidance is -- is -- it gives relatively clear
15 guidance as to this question of premium wages or
16 the opposite, does not give much guidance, at
17 least the portions that I've read, about how it
18 is that one is supposed to think about the
19 burdens on co-employees.

20 So could you tell me, like, what the
21 EEOC has done in this area, how it thinks about
22 this, and how that is different from
23 Petitioner's?

24 GENERAL PRELOGAR: Yes. So the first
25 line that the EEOC has drawn is to distinguish

1 between the types of impacts on coworkers that
2 are relevant, and this goes back to my responses
3 to Justice Alito.

4 Mere coworker grumbling or resentment
5 that someone else is getting an exemption from a
6 neutral policy is not sufficient and cannot
7 factor into the analysis of undue hardship.
8 That's equally true for actual actions like
9 quitting or transferring if it's motivated by
10 just being unhappy that there's a religious
11 accommodation requirement out there or by actual
12 religious animus. So you take those impacts off
13 the table.

14 And then what the EEOC guidance
15 teaches is that this -- this, like everything
16 else, falls on a continuum, and so I can't give
17 you categorical bright lines of exactly the
18 point at which coworker impacts are going to
19 suffice to show undue hardship, but it's clearly
20 the case that it's going to be relevant how many
21 workers there are, how diffuse the burdens can
22 be spread, what are the actual -- what the
23 concrete evidence shows about how the other
24 coworkers are materially having their workplace
25 changed, and the way that that affects the

1 conduct of the business, whether you see things
2 like the disruption of the workflow and the
3 workspace here, as the lower courts credited.

4 So there -- as I have said many times,
5 and I realize I'm a broken record on this,
6 there's a lot of case law out there.

7 JUSTICE KAGAN: But, in this context
8 where we're talking about burdens on
9 co-employees, meaning that they'll have to work
10 more or they'll have to work different hours
11 than they otherwise would have, you know, what
12 is the difference between your view and
13 Mr. Streett's view on that?

14 GENERAL PRELOGAR: So I think I
15 understand him to say that that is -- perhaps he
16 would say it would rarely rise to the level,
17 although he holds open the possibility that you
18 could take that into account in -- in maybe
19 extreme cases.

20 You know, I don't know that he staked
21 out a clear position on exactly when those
22 impacts count other than to agree with us that,
23 of course, it's context-dependent.

24 And so I want to be clear that we're
25 not suggesting that anytime a coworker has to

1 pick up one extra shift in a blue moon that
2 that's going to show undue hardship.

3 It doesn't work that way. It's not a
4 categorical rule. But, as the burdens on
5 coworkers increase, as you have an identified
6 small pool of carriers in this little rural post
7 office, it's not surprising to see that the
8 burdens actually manifest into things like
9 quitting and transferring and filing grievances.

10 JUSTICE KAGAN: Thank you.

11 CHIEF JUSTICE ROBERTS: Justice
12 Gorsuch?

13 JUSTICE GORSUCH: Just I hope a quick
14 question about premium wages. This case, of
15 course, involves the post office trying to serve
16 Amazon's needs on Sunday, and I understand the
17 post office's financial plight.

18 But what if -- what if the facts are
19 that an employer has to pay a premium wage to
20 get anybody to work on Saturday or Sunday, and
21 you do have a religious employee who wants to
22 take either Saturday or Sunday off because of
23 their sincerely held religious beliefs so that,
24 yes, the employer is always going to have to pay
25 a premium wage, but it's going to have to pay a

1 premium wage for Saturday and Sunday work no
2 matter what, because it's just hard to get
3 anybody to work those days because some people
4 want to go to church and others want to go to
5 their kids' soccer games.

6 Would that be proof enough for the
7 employer to escape undue burden under your --
8 under your test?

9 GENERAL PRELOGAR: No, not at all. If
10 the employer is paying the same amount
11 regardless, just because weekend days require
12 the payment of premium wages --

13 JUSTICE GORSUCH: Yeah.

14 GENERAL PRELOGAR: -- and the employer
15 is able to secure someone else to fill in for
16 that portion of the work, then I don't think the
17 employer would have a valid undue hardship
18 defense.

19 JUSTICE GORSUCH: Thank you.

20 CHIEF JUSTICE ROBERTS: Justice
21 Kavanaugh?

22 JUSTICE KAVANAUGH: Sorry. I have
23 several questions.

24 First of all, on substantial costs,
25 that was in Footnote 14, that's, I think,

1 responding to the dissent's concern in Hardison
2 and saying substantial costs.

3 Do you agree that that's the same as
4 more than de minimis costs for purposes of
5 Hardison?

6 GENERAL PRELOGAR: Yes, I think the
7 Court was using those terms interchangeably.

8 JUSTICE KAVANAUGH: Okay. And then
9 how exactly do we say that without destabilizing
10 the law is the concern you've raised. I guess
11 your answer to that is we need to say more about
12 the first bucket, regularly operating
13 shorthanded and regularly paying premium costs.

14 Is that how we solve the
15 destabilization concern from saying substantial
16 costs is the -- always been the test?

17 GENERAL PRELOGAR: So I think the way
18 to preserve stability in the law in this area
19 while also cleaning up at the margins any
20 confusion that's been produced by the de minimis
21 test, for the Court to say that Hardison is an
22 interpretation of undue hardship that is
23 inherently a qualitative context-based standard,
24 and so the use of the language the Court had
25 there, which alternated between substantial and

1 more than de minimis, can only actually take its
2 greater meaning from looking at the facts of
3 that case.

4 The EEOC and the lower courts from
5 1980 onwards for more than 40 years have
6 properly applied Hardison in light of its facts.

7 And to Justice Gorsuch's point, to the
8 extent any courts out there are reading this
9 literally to mean de minimis means you never
10 have to accommodate, that is wrong, that is
11 inconsistent with the current state of the law,
12 and the Court makes clear that's not what
13 Hardison meant.

14 And then I think, you know, to fill in
15 the details, Justice Kavanaugh, I don't think
16 there's a way for this Court to try to top-down
17 do that with the limits of language that exist
18 in this context's space.

19 Instead, I think the way to preserve
20 stability is to make clear that you don't need
21 to redo all of the work that's been done for
22 five decades under the Hardison standard as
23 properly understood.

24 JUSTICE KAVANAUGH: Do you understand
25 "undue hardship" -- I understand that term in

1 the original statute to reflect a balance
2 between two important values: one, religious
3 liberty and the other the rights of American
4 businesses to thrive, and to thrive, you have to
5 be able to make money.

6 Is that how you understand "undue
7 hardship"?

8 GENERAL PRELOGAR: I certainly
9 understand it to recognize that there are
10 interests on both sides of the balance, but we
11 don't think that the standard requires trying to
12 measure the interests of the employer, for
13 example, as against the significance of the
14 employee's religious practice.

15 The concern with that is that it's
16 just incommensurable interests and there's no
17 real way for courts to conduct that balance.
18 And so I think the right way to think about it
19 is Congress struck the balance, it recognized
20 that it is important to protect religious
21 practice and liberty in the workplace, it
22 created this duty to accommodate, but up to the
23 line of undue hardship, and then to figure out
24 what's undue, you look only at the employer side
25 of things to figure out when the costs become

1 inappropriate or unwarranted.

2 JUSTICE KAVANAUGH: Two more. The
3 MOU -- the MOU, how does it apply in this case?
4 What's -- does it control this case?

5 GENERAL PRELOGAR: We think that it
6 absolutely controls this case. The district
7 court squarely held and there is no way to get
8 around the district court's factual findings
9 about the -- or its understanding of the meaning
10 of the MOU in this case, because I think that
11 it's evident from its plain terms that the MOU
12 created the strict rotation system for Amazon's
13 Sunday delivery. It was carefully negotiated
14 with the bargaining unit of the postal carriers
15 because these were undesirable shifts. And it
16 sets out three exceptions, none of which apply
17 here.

18 My friend says maybe those aren't
19 exclusive. But the whole point in having
20 this -- this carefully delineated scheme is to
21 create these rights of employees so that they
22 can rely on it for purposes of knowing when they
23 have to work on Sunday.

24 JUSTICE KAVANAUGH: Last one. The
25 three buckets were helpful. I just want to

1 confirm. The second and third buckets, which
2 were dress and grooming and religious symbols
3 and the like, you were pretty clear there, I
4 just want to double-check, that offense by
5 coworkers is not a basis there for preventing
6 the employee from wearing certain symbols or
7 certain kinds of dress.

8 GENERAL PRELOGAR: So -- so that's --

9 JUSTICE KAVANAUGH: Maybe that's too
10 absolute.

11 GENERAL PRELOGAR: -- right in the
12 main -- right, that's a little too absolute --

13 JUSTICE KAVANAUGH: Yeah.

14 GENERAL PRELOGAR: -- because there
15 are situations --

16 JUSTICE KAVANAUGH: In the main.

17 GENERAL PRELOGAR: -- for example,
18 where you're the front door man, and if you want
19 to put up a symbol, it could be attributed to
20 your employer, so if there's confusion about --

21 JUSTICE KAVANAUGH: I got it.

22 GENERAL PRELOGAR: -- whose speech it
23 is, that might be an exception, so I don't want
24 to speak too categorically.

25 I just wanted to emphasize that to the

1 extent Petitioner is painting a picture here
2 that you just can never do any of this and none
3 of it's accommodated, that is wrong.

4 JUSTICE KAVANAUGH: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice
6 Barrett?

7 JUSTICE BARRETT: So you said a number
8 of times and it seems clear that this is a
9 contextual inquiry. But it seems to me that
10 there's one bright line that you are asking for
11 that you're pulling out of Hardison, and that's
12 money.

13 And -- and I understand your answers
14 to some of the questions, especially to Justice
15 Alito, to be anything more than you would
16 otherwise pay, even if it's \$1 an hour, to the
17 Amazon person, under Hardison, it's your
18 understanding that that's a premium wage because
19 it's more than they would otherwise receive.

20 GENERAL PRELOGAR: So I appreciate the
21 chance to clarify. I don't think I would draw
22 the line quite that bright, but I do understand
23 Hardison to have suggested that that is an
24 inappropriate and unwarranted type of
25 accommodation. And I think it's not just

1 because of the cost. In fact, you can imagine
2 scenarios like the one Justice Alito posited
3 where maybe the costs don't seem that
4 significant.

5 Instead, I think it really goes to
6 what I was trying to say earlier, that it's
7 about the nature of the accommodation. You're
8 just excusing someone from doing part of their
9 job and you're transferring to the employer the
10 ongoing requirement to have to fill that spot
11 and pay more to do so in getting a replacement
12 worker in there.

13 JUSTICE BARRETT: Well, I guess I
14 don't see why it's ongoing. It mean a
15 contextual inquiry would say we might treat the
16 rural grocery store differently than we would
17 treat Amazon, or -- or maybe our, you know,
18 financially floundering post office gets treated
19 differently than Amazon. But circumstances can
20 change. The contexts can change. And why can't
21 the employer come back and say, well, I've been
22 accommodating you by paying someone else a
23 dollar extra an hour or time and a half or
24 whatever it is, but things have changed and I
25 can no longer offer you that accommodation? Why

1 isn't that -- why does it have to be in
2 perpetuity?

3 GENERAL PRELOGAR: So I certainly
4 think if there were evidence to suggest that
5 this is just going to be a temporary problem,
6 you know, you have new people who are starting
7 two months down the road and you can see that at
8 that point you're going to be able to get
9 voluntary shift swaps or something like that, of
10 course that can be taken into account.

11 And so I don't mean to suggest that
12 those types of contextual considerations are off
13 limits. It's just that, to the extent that it's
14 a request for an accommodation in perpetuity
15 that requires payment of overtime wages, I think
16 Hardison was trying to shut the door on that.

17 JUSTICE BARRETT: Well, I guess my --
18 my question, my follow-up question to that
19 response would be, so you're saying that
20 requiring the employer and saying that the law
21 requires the employer to pay if it's temporary
22 because it's going to be for two months only,
23 that that might not be, you know, an undue
24 hardship; however, if the employer says, yes,
25 I'm going to make this reasonable -- this

1 accommodation is reasonable, it's not an undue
2 hardship for now, but six months from now
3 there's an unanticipated change of
4 circumstances -- I guess what I'm saying is it
5 seems to me like it would always be implicit
6 that I will offer you this accommodation so long
7 as it's not an undue hardship, but how could
8 anyone anticipate that maybe in six months' time
9 suddenly they would be short-staffed and
10 shorthanded?

11 So I guess your argument has a lot
12 more force if you assume that it necessarily
13 would be in perpetuity, as opposed to something
14 that could be revised if circumstances changed.

15 GENERAL PRELOGAR: Well, certainly, in
16 your hypothetical, I think that the employee
17 would get the accommodation because it's not an
18 undue hardship at time one, and then --

19 JUSTICE BARRETT: Even if it's time
20 and a half?

21 GENERAL PRELOGAR: Oh, so I understood
22 you to be saying that -- if the employer is
23 choosing voluntarily --

24 JUSTICE BARRETT: No, no, no, no.

25 GENERAL PRELOGAR: -- to supply the

1 accommodation.

2 JUSTICE BARRETT: No, no, no, no.

3 Well, I'm saying even if -- even if it winds up
4 being court-ordered. You're -- because you're
5 saying that the Court could never say that
6 that's what was required because any premium
7 wage, and a premium wage is any money more, five
8 dollars more, five dollars a week, you're paying
9 more than you might otherwise pay? So I
10 understand you to be saying it's a bright line,
11 if there's not an end date on it that's pretty
12 short. Am I misunderstanding?

13 GENERAL PRELOGAR: So that's I
14 think -- so I think the reading of Hardison is
15 that the regular payment of time and a half,
16 that was the premium wage at issue there, the
17 Court determined was an undue hardship. And --

18 JUSTICE BARRETT: But in -- in
19 footnote -- Justice Kavanaugh was talking about
20 footnote 14. In footnote 15, the Court also
21 says that the argument that that money was --
22 "the dissent's argument that that money wasn't a
23 problem also fails to take account of the
24 likelihood that a company as large as TWA may
25 have many employees whose religious observances

1 require that accommodation." So it wasn't about
2 just the one. It was about the possibility that
3 there would be many.

4 And -- and maybe there would be; maybe
5 there wouldn't be. I mean, it was different for
6 the post office to try to accommodate his
7 Sabbath request in this rural office than it
8 might be in, you know, New York City. So I
9 guess I'm just wondering why we have to make the
10 line as bright as you're asking us to make it.
11 That seems contextual.

12 GENERAL PRELOGAR: So I certainly
13 agree that one of the relevant contextual
14 considerations is how many employees need the
15 accommodation based on, you know, not just
16 speculation but -- but concrete evidence. And
17 that is reflected in the EEOC's guidance.

18 I interpret that part of Hardison to
19 say -- that comes after the Court had already
20 said that on these facts Hardison was demanding
21 something that would cost substantial costs
22 associated with the regular payment of overtime
23 or stripping other employees of their -- of
24 their contractually bargained-for seniority
25 rights. And so this point about other employees

1 was just an -- an additional fortifying
2 consideration that it would be undue for TWA,
3 given the prospect that other employees would
4 likewise need the accommodation.

5 JUSTICE BARRETT: Okay.

6 CHIEF JUSTICE ROBERTS: Justice
7 Jackson?

8 JUSTICE JACKSON: So it sounds to me
9 similar to what Justice Sotomayor said, that
10 whether any kind of accommodation is going to be
11 required under any set of circumstances, you
12 know, the answer is it depends. Is that right?
13 I mean, it's all context-specific. And so can
14 you just answer, your responses to all of the
15 various hypotheticals that we've asked you
16 about, are they coming from your understanding
17 of how Hardison has been applied by the EEOC and
18 the courts? It's not just you standing there
19 saying this is what I think about a particular
20 scenario, right?

21 GENERAL PRELOGAR: Yes, absolutely. I
22 am replying -- relying heavily on and drawing
23 from the EEOC's guidance and its lived
24 experience with implementing Hardison for the
25 past 50 years, as well as the body of case law

1 that's reflected in the EEOC guidance that I
2 keep pointing to.

3 JUSTICE JACKSON: So we may find, if
4 we were to delve into that body of case law, the
5 answers to some of these questions or at least
6 what the EEOC thinks about how this should be
7 applied, and your concern is destabilizing that
8 set of -- of -- of determinations?

9 GENERAL PRELOGAR: Exactly. And the
10 colloquies that we've been having about the
11 limits of language in trying to articulate a
12 standard in this context. No matter what, as
13 your question touched on, Justice Jackson, this
14 is context dependent, and it is going to require
15 an assessment of that individual employer's
16 facts and circumstances. And I think that that
17 hard work of filling in the details has largely
18 been done and that the Court should not take
19 steps to unsettle it now.

20 JUSTICE JACKSON: Thank you.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 Mr. Streett?

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1 REBUTTAL ARGUMENT OF AARON STREETT

2 ON BEHALF OF THE PETITIONER

3 MR. STREETT: This Court should not
4 apply the strong medicine of statutory
5 stare decisis where it's, at best, unclear that
6 the Court had before it in Hardison the current
7 version of the statute, and it certainly should
8 not apply those doctrines when the government is
9 not even defending the test by its terms or
10 defending the neutrality rationale of Hardison.

11 So the question before the Court is,
12 then, which new test is going to be applied? I
13 wish I could agree with the government's rosy
14 view of how lower courts have applied Hardison.
15 A lot of that view seems to be coming from the
16 EEOC, but it's quite notable that the EEOC has
17 not joined this brief, as it has in many other
18 civil rights cases.

19 This Court should reject the
20 government's watered down test for undue
21 hardship. It will provide inadequate protection
22 for religious liberty in the workplace, and it
23 will even gut Sabbath accommodations, the very
24 accommodation that was at the center of the 1972
25 amendment.

1 And the reason is because that test is
2 still inextricably tied to Hardison's
3 "de minimis" language and to Hardison's
4 holdings. My friend has repeatedly defending
5 those holdings -- defended those holdings as
6 written. Therefore, they're defending at least
7 three propositions: Weekly over time for a
8 single employee to substitute for a Sabbath
9 observer is an undue hardship. That's the
10 holding of Hardison, even in the context of
11 Trans World Airlines. That does not line up
12 with any statutory meaning of undue hardship.

13 Denial of any coworker's shift
14 preference is an undue hardship under the
15 government's position because that would require
16 compelling somebody to work when they don't want
17 to.

18 And maybe the most striking is that my
19 friend says that any alteration of a CBA is
20 going to be a per se undue hardship. So that
21 means, as -- as Justice Alito elicited, if the
22 employer and the union simply frame their CBA as
23 being a rotation system, there will be no
24 accommodation for Sabbath observers to be able
25 to take their day of rest.

1 My friend refers to the destabilizing
2 of case law, but she admits that the case law
3 has already gone off the rails. At least in
4 many courts are -- are not protecting religious
5 liberty because they're taking the de minimis
6 test by its terms.

7 So we're just left with which new test
8 is going to be applied. And we think the right
9 answer is to go to the plain meaning text of the
10 statute.

11 I have not heard a single word about
12 the text of undue hardship. I have not heard
13 any textual analysis from the government. I've
14 heard a lot about buckets. I've heard a lot
15 about different scenarios and holdings of
16 Hardison. But that cannot defended as a matter
17 of the text.

18 In the United States today, employers
19 are already applying a web of accommodations
20 under a variety of statutes: the Americans with
21 Disabilities Act, the Pregnant Workers Fairness
22 Act, USERRA. These employers know how to apply
23 the significant difficulty and expense standard,
24 and it will not be a problem for them to apply
25 that to religious employees, including as to

1 morale issues.

2 And the government today has not given
3 us any reason why religious employees should
4 have less accommodation than all of those other
5 individuals protected under the other statutes
6 that share the same reasonable accommodation and
7 undue hardship framework.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.

10 The case is submitted.

11 (Whereupon, at 11:56 a.m., the case
12 was submitted.)

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